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MICHAEL RODAK,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-149

ROBERT L. TAYLOR,

Petitioner,

v.

STATE OF TENNESSEE by THOMAS H. SHRIVER, *ex rel.* THOMAS A. HIGGINS; STATE OF TENNESSEE *ex rel.* JOHN J. THOMASON; DAVID M. PACK, Attorney General and Reporter of the STATE OF TENNESSEE; THOMAS F. TURLEY, JR.; ROBERT E. COOPER; T. MACK BLACKBURN; HOWARD KESLEY; and JOHN W. WILSON,

Respondents.

PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. .....

ROBERT L. TAYLOR,

Petitioner

vs.

STATE OF TENNESSEE by THOMAS H. SHRIVER, *ex rel.* THOMAS A. HIGGINS; STATE OF TENNESSEE *ex rel.* JOHN J. THOMASON; DAVID M. PACK, Attorney General and Reporter of the STATE OF TENNESSEE; THOMAS F. TURLEY, JR.; ROBERT E. COOPER; T. MACK BLACKBURN; HOWARD KESLEY; and JOHN W. WILSON,

Respondents

Petition for the Writ of Certiorari to the Supreme Court of Tennessee

OPINIONS BELOW

None of the opinions of the judges in the courts below has been officially or unofficially reported except in newspapers at this writing. The opinions of the judges of the Supreme Court of Tennessee and of the Chancery Court of Davidson County, Tennessee, are included in Appendix B hereto in accordance with Rule 23(1)(a) and (i) of this Court. This Appendix B is separately bound.

JURISDICTION

(i) The interlocutory and final orders and decrees sought to be reviewed herein were entered in the following chronological order: (1) two orders entered in the Supreme Court of Tennessee on September 6, 1972; (2) an order entered in the Chancery Court of Davidson County, Tennessee, on September 26, 1972; (3) an order entered in the Supreme Court of Tennessee on October 2, 1972; (4) orders entered in the Chancery Court of Davidson County, Tennessee, on October 6, October 9, and November 10, 1972; and (5) orders and decrees entered in the Supreme Court of Tennessee on December 4, 1972; January 11, 1973; March 19, 1973; April 9, 1973; and April 23, 1973, all of which are set out in Appendix B along with related opinions.

(ii) The decree of March 19, 1973, was the principal decree on the merits of the judges of the Supreme Court of Tennessee. An order of March 23, 1973, extended the time within which this petitioner could file a petition for rehearing. His petition for rehearing was denied by order entered April 23, 1973.

(iii) This Court has jurisdiction of this petition pursuant to the provisions of 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner was deprived of effective appellate review of the decision of the Chancery Court of Davidson County barring him from taking the seat on the Supreme Court of Tennessee to which he had been elected, where he was required to present his appellate contentions before five judges who were:

(a) Three elected judges who had a pecuniary interest in the outcome of the litigation and who had participated with a fourth regular judge (who later recused himself) in issuing a restraining order against the petitioner taking his seat on the court prior to the litigation in the court below.

(b) One special judge designated by the four regular judges mentioned above to fill the seat claimed by the petitioner in the litigation.

(c) A second special judge designated by the three elected judges and the first special judge to replace the regular judge who recused himself.

2. Whether the judges of the Courts below deprived the petitioner of his liberty and property without due process or equal protection of the law of Tennessee in excluding him from a seat on the Supreme Court of Tennessee to which he had been duly elected and for which he held a certificate of election, through the following actions:

(a) The action of four judges of the Supreme Court of Tennessee, whose jurisdiction is constitutionally limited to "appellate only," in issuing on their own motion an initial restraining order against the petitioner, without bond, without any pleadings requesting such relief, and before litigation in a court of original jurisdiction, and despite the petitioner's valid and accurate certificate of election to the post in a constitutionally set election.

(b) The action of the four judges in appointing the respondent, Cooper, to take the petitioner's place on the bench pending litigation in a court of original jurisdiction.

(c) The action of the four judges in appointing the respondent, Wilson, to the same seat after withdrawal of the respondent, Cooper.

(d) The action of the chancellor of the Chancery Court of Davidson County in continuing the restraining order in effect without adequate bond.

(e) By the actions of the chancellor in permitting the respondent, District Attorney General Thomas H. Shriver, to dismiss an action properly brought by Shriver upon the petitioner's relation in the only manner provided by Tennessee law for contesting usurpation of office in his jurisdiction, in favor of another proceeding with a different relator that was unknown to the law of Tennessee, and by the unprecedented procedural and evidentiary bases used to exclude the petitioner from office, including dismissal of his cross bill as to all defendants upon motion of only one of them, and disregard of his objections to the jurisdiction and other legal defects in the proceeding.

(f) By the action of the chancellor in going behind the petitioner's certificate of election and holding his election invalid in the face of conclusive stipulated facts and law to the contrary.

(g) By the actions of three elected and improperly appointed judges in failing to recuse themselves from the case for Constitutional and legal incompetence upon the petitioner's suggestion on oral argument and again by petition for rehearing.

(h) By the entry in the Supreme Court of an advisory declaratory decree in the same judgment which dismissed the case insofar as it sought declaratory relief and dismissed the defendants joined only for purposes of obtaining declaratory relief.

(i) By the issuance of a further advisory decree upon petition for rehearing by a party who had been dismissed both in the Chancery Court and in the Supreme Court.

3. Whether the decisions and declaratory decrees below deprived the petitioner and the thousands of qualified voters who cast ballots for him and his adversaries of the benefits of the republican form of government guaranteed by Article IV, §4 and Amendment XIV, §2, of the Constitution of the United States by substituting appointment of judges in lieu of elections mandatorily required by the specific language of the Constitution of Tennessee.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent texts of the constitutional and statutory provisions involved are printed in Appendix A hereto, *infra*, pursuant to Rule 23(1)(d) of this Court. They are:

Constitution of the United States: Article IV, §4; and the Fourteenth Amendment, §§1 and 2.

Constitution of Tennessee: (All contained in Volume 1, Tennessee Code Annotated, main volume): Article I, §§4 and 5, pp. 213, 214; Article II, §§1 and 2, pp. 377, 379; Article VI, §§2, 3 and 11, pp. 589, 617, 645; Article VII, §5, p. 676.

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STATEMENT OF THE CASE

On November 6, 1968, the people of Tennessee rejected a proposal to authorize a constitutional convention so far as it included proposals designed to permit the substitution of the so-called "Missouri plan" of appointment of judges subject to subsequent recall referenda in place of the provisions of the Constitution of Tennessee of 1870 requiring that judges be elected along with other civil officers at the regular biennial election next preceding the end of their eight-year terms, or at the next such biennial election occurring more than 30 days after a vacancy should occur. Article VII, §5 [A. 3].[1]

By Public Acts of 1971, Chapter 198, the General Assembly of Tennessee undertook to establish a so-called "modified Missouri plan" without Constitutional amendment, and this Act was officially codified at T.C.A. §§17-701 *et seq.* [A. 9-19] providing for a "Yes-No" referendum for incumbent appellate judges. This Act established an Appellate Court Nominating Commission for submitting three names to the governor from which he should choose one for appointment to fill any vacancy for a period which the Act itself provides "shall expire August 31 following the next August biennial general election recurring more than thirty (30) days after the vacancy." T.C.A. §17-712(2) [A. 15]. All then incumbents and subsequent appointees would be subject only to "Yes-No" referenda, but without opposition, for continuation in office.

On June 19, 1972, a judge of the Supreme Court of Tennessee for the Western Division died. On July 18,

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[1] Bracketed numbers throughout this petition preceded by the letter "A" refer to pages of Appendix A attached to this petition. Those preceded by the letter "B" refer to pages of Appendix B which is bound separately.

1972, the nominating commission, illegally headed by John J. Thomason, a member of the Committee to Re-Elect the President, see T.C.A. §17-704 [A. 11], nominated three candidates for appointment to the vacancy. The governor announced he would appoint one of them, the respondent, Thomas F. Turley, Jr., who was at all times material, and is now, United States Attorney for the Western District of Tennessee. However, the governor said he would make the appointment effective as of September 1, 1972, the day after the time for which such appointment would expire under the terms of the Act. T.C.A. §17-712(2), *supra*.

Ignoring well-publicized warnings from various persons, including this petitioner, of the illegality of his action, including well-publicized notice that his action in attempting to delay the appointment could result in a successfull write-in election for the period beginning September 1, he did not include any notice of this judicial vacancy in issuing his writ of election for the Constitutionally required biennial election scheduled August 3 under the mandatory terms of T.C.A. §17-113 [A. 7], and Article VII; §5; *supra*.

On July 31, 1972, after widely publicized speculation that he would do so, the petitioner, a former member of the Court of Appeals for West Tennessee and a former chancellor, announced his candidacy for the vacancy subject to the August 3, 1972, election. Both his announcement and the statutory method by which voters could write in names for the vacancy pursuant to T.C.A. §2-1207 [A. 4] were given widespread publicity.

After the August 3 election, local election officials in 46 counties certified to the Secretary of State a total of 4,030 write-in votes cast throughout the state for persons to fill the vacancy. Of these, the petitioner received

3,301, the respondent, Turley, received 555, and others received 174.

In addition, the petitioner received 103 write-in votes for Judge of the "U. S. Supreme Court," apparently written on the Democratic Primary ballots cast at the same time, or at least tabulated on that sheet by the Secretary of State. Chief Judge Mark A. Walker of the Tennessee Court of Criminal Appeals received 1 write-in vote for the U. S. Supreme Court, similarly tabulated. These were cast in nine different counties, of which five had failed to report any write-in votes in the contest for judge of the Supreme Court of Tennessee. In addition, three of the counties that failed to report votes for the vacancy in issue, also failed to report returns in other races. Otherwise there is no explanation in the record for the failure of reports from more than 46 counties for the vacancy in issue.

The largest total vote shown in the record for the August 3 balloting was 668,363 in a tax referendum. Next largest was a total of 630,695 in the Republican and Democratic senatorial primary balloting combined, and the next largest was for a Court of Appeals referendum conducted (without challenge) under the "modified Missouri plan," in which 296,486 ballots were reported, with two counties not reporting any.

Accordingly, on August 18, 1972, as required by T.C.A. former §2-1421 [A. 4], the Secretary of State issued a certificate of election certifying that the petitioner "was duly elected Judge, Western Division, Supreme Court of Tennessee in the August 3, 1972, General Election." On the same date, the petitioner wrote the Chief Justice of the Supreme Court a letter enclosing a copy of the certificate and inquiring about how and when he could present himself to take his oath.

On August 21, 1972, the governor forwarded to the Executive Secretary of the Supreme Court a commission purporting to name the respondent, Turley, "to fill the office of JUSTICE OF THE SUPREME COURT OF THE STATE OF TENNESSEE, EFFECTIVE SEPTEMBER 1, 1972 TO SERVE UNTIL SEPTEMBER 1, 1974, AND UNTIL HE SHALL HAVE BEEN ELECTED AND RETAINED IN OFFICE PURSUANT TO SECTION 17-715, TENNESSEE CODE ANNOTATED. ..."

On August 23, 1972, the petitioner, lacking advice from the Chief Justice, took his oath before the Honorable L. F. Stewart, Chancellor of the Chancery Court of McMinn County, Tennessee.

On the same day, the respondent, State of Tennessee, *ex rel.* John J. Thomason, filed a complaint somewhat in the nature of a bill of *quo warranto* against the petitioner and the Secretary of State, seeking to have the certificate of election declared void and the petitioner restrained from attempting to "qualify as, hold or exercise the powers of a Justice of the Supreme Court of Tennessee pending the outcome of this suit."

On August 24, 1972, the petitioner, by counsel, forwarded to the Clerk of the Supreme Court for each grand division of the state a certified copy of the oath taken by the petitioner in the Chancery Court of McMinn County.

In response to requests from the Chief Justice, the respondent Turley, *pro se*, and the petitioner, by counsel, filed papers stating their respective positions and the authorities on which they relied with respect to their claims to the office.

The petitioner suggested the Court would have nothing to decide unless two persons presented themselves

simultaneously to sit in the vacant chair in the courtroom and that the petitioner's certificate of election by the people constituted *prima facie* evidence of title to the office superior to the governor's purported commission, and that the certificate should be honored pending outcome of an appropriate proceeding in some court of original jurisdiction.

The respondent, Turley, submitted a letter contending that an action in *quo warranto* in a court of original jurisdiction was the only proper method of determining title to the office and saying that "I have no intention of taking the oath of office from the governor, which the law permits, or of attempting to take it from anyone else, until this Court—for its sake and the sake of the people of Tennessee and not for mine—has dispelled the cloud of Mr. Taylor's claim and welcomes me as an Associate Justice, at which time I shall take my oath of office in open Court from a member of the Court." He attached a copy of the pending Thomason complaint seeking an injunction against the petitioner in the Chancery Court of Davidson County.

At the opening of the Supreme Court of Tennessee in Nashville for a new term on September 6, 1972, the Chief Justice read a prepared order, signed by himself and the other three members of the Court, other than the petitioner.

This order held (1) that the petitioner and the respondent, Turley, each had presented to the Court "a substantial claim of title to the office" [B. 1]; (2) "This Court having appellate jurisdiction only is not permitted to resolve these conflicting claims" [B. 1]; but (3) under its "inherent power and duty to act to protect the continued orderly administration of justice and the validity of its judgments" the petitioner and the respondent, Turley, "are restrained

from taking a seat on this Court until their claims have been adjudicated on their merits to final judgment under the usual processes of the law." [B. 2]

In addition, the order suggested that the governor should appoint "a temporary judge, other than either of the claimants, to this Court to sit during the pendency of this litigation," under the authority of T.C.A. §17-226 [A. 8].

Without awaiting the outcome of this suggestion, however, the Court entered an order on the same day [B. 3] appointing the respondent, Robert E. Cooper, a judge of the Court of Appeals for East Tennessee, to fill the vacancy "effective September 6, 1972," and he did begin sitting immediately after a brief recess following the reading of the order restraining the petitioner.

Since T.C.A. §17-226 provided only for interim appointments pending election contest suits, and no election contest suit was then pending, see T.C.A. §23-2808 [A. 20], the governor properly declined to make an appointment, as suggested.

On September 7, 1972, the District Attorney General, the respondent, Shriver, on relation of this petitioner, filed in the name of the State a proper action in *quo warranto* against the respondent, Cooper, pursuant to T.C.A. §§23-2801 *et seq.* [A. 19 *et seq.*], in the Chancery Court of Davidson County, alleging Judge Cooper was usurping the office to which the petitioner was entitled and also making the respondents, T. Mack Blackburn and Howard Kesley, defendants as persons who illegally had acted as state officials in barring the petitioner from his offices on and after September 1, 1972. By direction of the chancellor this case was docketed as A-1812-A along with

the prior premature action filed by the respondent, State of Tennessee *ex rel.* John J. Thomason, previously docketed as A-1812.

On September 21, 1972, the District Attorney General, on relation of Thomas A. Higgins, filed a new action in the name of the State against the governor and the secretary of state, purporting to invoke T.C.A. §§23-2801 *et seq.*, *supra*, but actually seeking a declaratory judgment as to whether the "Modified Missouri Plan" was constitutional whether the governor's commission or the secretary of state's certificate was valid, and alleging hypothetically and in the alternative that each of them might be invalid. This case was docketed with the previous two as No. A-1812-B.

The District Attorney General thereupon moved to dismiss the prior two cases. In the course of the hearing on this motion, the following exchange took place:

"THE COURT: You brought a quo warranto, which is basically somebody is usurping the office. Who is going to be usurping the office in your complaint? We need a usurper.

"GEN. SHRIVER: I disagree with Your Honor. I don't think there is a usurper.

"THE COURT: Cite me any case law and I will be glad to listen.

"GEN. SHRIVER: If Your Honor is convinced that there is the only possible route for this lawsuit, then I think Your Honor's proper procedure, the most likely procedure, would be to dismiss my new suit, dismiss the Tomasson suit, and travel on Judge Taylor's suit,

because that's the only one that names anybody that could conceivably be a usurper; but I don't think he is and I am not willing to allege that in my bill."

The outcome was that the District Attorney General was allowed to amend his newest bill the add the petitioner and the respondent, Turley, as defendants for *quo warrento* purposes, although neither of them was then holding the office in issue, and to add the respondent, Pack, as Attorney General of the State, as a defendant for the declaratory decree aspect of the hybrid complaint, as required by Tennessee's Declaratory Judgment Statute, T.C.A. §23-1107.

The complaint having been so amended, the Chancellor entered an order September 26, 1972, dismissing Nos. A-1812 and A-1812-A and continuing in effect the Supreme Court's prior restraining order under bond of only $1,000 [B. 5-7].

On September 27, 1972, the petitioner filed a petition to rehear the matters decided in the order of September 26, 1972, exhibiting the Court Reporter's transcript quoted above, and specifically invoking his federal and state constitutional rights.

On September 29, 1972, the petitioner, responding to the trial court's insistence upon speed in reaching the "merits" of the case, the petitioner filed an answer and cross-bill specifically reserving his pending objections, and including a number of serious legal defenses that in ordinary course of Tennessee law should have been considered on motion before answer.

The preliminary defenses (1) challenged the Court's jurisdiction and venue, (2) invoked the statute of limitations on election contest cases, (3) contended the case

lacked parties indispensable to the prosecution of the case as *quo warranto*, (4) sought dismissal because the odd conglomeration of allegations of the bill presented a case outside the "usual processes of the law" applicable to the basic controversy sought to be presented, (5) that it was duplicitous and based upon hypothetical and mutually repugnant allegations, (6) challenged the authority of the District Attorney General to seek a declaratory judgment and (7) alleged the absence of any genuine issue between the parties on which a declaratory decree could be based. The answer to the specific allegations of the bill detailed by denial and affirmative allegation the factual and legal defects in the bill, including the omission of the only usurpers, the respondents, Cooper and Wilson; a denial that the attorney general had properly been made a party defendant; and a denial that the constitutionality of the "modified Missouri plan" was properly in issue in the case, although admitting plan totally unconstitutional.

In his cross-bill he adopted the allegations of the prior correct bill in quo warranto, No. A-1812-A by reference and named the defendants in that case as well as the respondent, Wilson, as cross-defendants.

The order naming the respondent, Wilson, to the seat on the court, signed by all four of the regular judges on the Supreme Court of Tennessee was entered on October 2, 1972, validating the prior public announcement of his appointment [B. 7].

On October 6, 1972, the Chancellor entered an order denying the petition to increase the injunction bond, and permitting additional amendment of the complaint in A-1812-B [B. 9].

On October 9, 1972, the Chancellor entered an order denying the petitioner's motion to hear the legal defenses

included in his answer, overruling them with leave to rely on them at the trial, overruling certain motions filed by other defendants in similar manner, and granting the motion, made only by the respondent, Turley, to dismiss the petitioner's counterclaim [B. 12].

On October 21, 1972, the petitioner filed a supplemental answer to respond to the complaint as further amended after his prior answer. This answer contended, that the defendants, Dunn, Carr and Pack, were not properly parties to the same suit in which the petitioner was a party, and again alleged the court had no jurisdiction to pass upon the validity of the "modified Missouri plan" under the conglomerated complaint, and that the defendant, Turley, could not defend his claim under that act because his appointment was not in accordance with the requirements of that statute.

The case was tried upon stipulated facts and voluminous exhibits thereto, none of which controverted any of the petitioner's denials or affirmative allegations of fact.

On November 10, 1972, the Chancellor entered a memorandum [B. 14] reciting a highly selective portion of the stipulated facts and holding: (1) that the court had jurisdiction of the case under the ***quo warranto*** statute merely upon the ***claims*** of title to the office in issue, relying upon an unadjudicated portion of the recitation of facts in a single prior Supreme Court case, ***State ex rel. Bryant v. Maxwell***, 189 Tenn. 187 (1949); (2) that the defendants Dunn and Carr should be dismissed as parties; (3) that it was not necessary to pass upon the constitutionality of the "modified Missouri plan" to adjudicate the claims of the petitioner and the respondent, and that he was prohibited from entering advisory opinions; (4) that the attempted appointment of the respondent, Turley, to a

term beginning September 1, 1972, did not follow the command of the Constitution of Tennessee, or of the relevant statutory provisions as amended by the "modified Missouri plan" and was therefore void; and (5) that the disparity between the number of reported write-in votes for the Supreme Court vacancy and the number reported for the issue that attracted the largest number of votes of the same day (a constitutional tax amendment) was such as to indicate lack of actual notice of the election to the judicial vacancy and therefore his certificate of election was invalid and he was not entitled to the office.

On the same day, the chancellor entered an order holding certain stipulated facts and exhibits irrelevant, including the fact that Mr. Turley had been and still was United States Attorney for the Western District of Tennessee, that three of the nine members of the nominating commission had been named by the speakers of the houses of the General Assembly, and that the chairman of the commission was a member of the Shelby County Committee to Re-elect the President, and exhibits relating to these two items. Otherwise, the order recited that the statement of facts in the opinion indicated the court's view of relevancy and materiality [B. 34]..

A decree in accordance with the memorandum was entered the same day [B. 35].

Appeals were perfected the same day by the respondent, State of Tennessee by Thomas H. Shriver *ex rel.* Thomas A. Higgins, and by the petitioner. An appeal was perfected by the respondent, Turley, on November 13, 1972. The parties dismissed below did not appeal. However, in Tennessee, non-jury cases are tried *de novo* on appeal, T.C.A. §§27-301, 27-303, 27-304. The record was filed in the Supreme Court November 13, 1972.

On December 4, 1972, an order signed by the four regular judges of the Supreme Court and by the respondent, Wilson, was entered transferring the case to the Eastern Division of the state for an expedited hearing on January 11, 1973 [B. 37].

All appellants filed their assignments of errors and briefs on December 8, 1972.

The petitioner's assignment recited that he "continues to insist upon the validity of his positions taken throughout his answer," but they would be argued, if necessary, in response to the other appellants. He formally assigned four errors, the key language of which may be here stated for brevity as:

1. In view of the law and facts before the chancellor, including the unchallenged certificate of election, the chancellor "erred by failing to hold that the command of the Constitution and the votes of the electors combined to accord the office to the" petitioner.

2. The Chancellor "erroneously assumed, without *any* evidence ... that recognition of write-in votes authorized by express statutory provision 'would effectively disfranchise the vast majority of the citizens who cast votes in the state wide election on August 3, ...'"

3. The Chancellor "erroneously isolated a single item of circumstantial evidence, and drew therefrom a factual conclusion contrary to common human experience, ... other circumstances," and Tennessee authority "that the lack of official notice of an election whose time and place are fixed by the Constitution will not vitiate the election."

4. The petitioner's "property was taken from him without due process of law."

In his brief he cited state and federal constitutional provisions to support the proposition that "No power exists in any department of the Government of Tennessee ... to take an individual's property without due process of law."

The respondent, Turley, contended his appointment was authorized by statute and the statute was valid.

The respondent, State of Tennessee by Thomas H. Shriver ***ex rel.*** Thomas A. Higgins, complained of the chancellor's failure to declare the "modified Missouri plan" unconstitutional.

On December 13, 1972, the respondent, Pack, filed a reply brief agreeing that the chancellor correctly refused to reach the declaratory judgment matter, but included a copy of his brief below recognizing difficulties but contending that a statute must be presumed constitutional.

On January 2, 1973, the State, by Shriver ***ex rel.*** Higgins presented a very convincing destruction of the Attorney General's reply insofar as it had relied on the presumption of the validity of a statute. On the same date, the respondent, Turley, filed a reply brief in which he agreed with the petitioner and the respondent, Pack, that a declaration on the validity of the "modified Missouri plan" was not necessary, but still contending that he had been properly appointed under the Act.

On January 11, 1973, the petitioner filed a special memorandum on the Tennessee case relied upon by the Chancellor to give him jurisdiction, ***State ex rel. Bryant v. Maxwell, supra,*** showing that the interpretation placed upon it by the Chancellor was at odds with another case decided the same day as *Maxwell*, see *Jeffers v. Botts*, 188 Tenn. 694 (1949), which required that issues such as those decided by the Chancellor against this petitioner could be considered only in an election contest suit which would have had to be brought in another jurisdiction.

Also on January 11, the respondent, Pack, submitted a supplemental brief in which he reiterated his position that the Chancellor was correct in refusing to rule on the validity of the "modified Missouri plan," and going further and saying that "it would set a precedent in this state if this Court were to pass on the constitutionality of a legislative act when the merits of a lawsuit could be determined without doing so."

Also on January 11, 1973, three regular judges and the respondent, Wilson, signed an order designating Court of Appeals Judge Robert E. Cooper to sit in place of the Chief Justice who had belatedly recused himself.

On the oral argument the same day, counsel for the petitioner called the judges' attention to the question of their competence to sit in this particular case.

On March 19, 1973, an opinion concurred in by two of the regular judges and the two substitute judges, including the respondent, Wilson, was entered purporting to hold:

(1) That the chancellor was correct in holding this a proper *quo warranto* proceeding [B. 46].

(2) That all of the petitioner's specifications of error, including his due process claim, could be disposed of on the question whether "the Chancellor should have held that the [petitioner] was lawfully elected" [B. 47].

(3) That the petitioner's assignments assumed validity of statutes and the "modified Missouri plan" statute's effect "repealed the provisions for the kind of an election as that under which the [petitioner] asserts title to the office" [B. 50].

(4) That "there was no election for Judge of the Supreme Court on August 3, 1972" [B. 53].

(5) That the referendum, plebiscite, or recall balloting provided in the "modified Missouri plan" constituted an "election" within the meaning of the Constitution [B. 59].

(6) That the portion of the "modified Missouri plan" providing that three legislators be appointed to the nominating commission was unconstitutional [B. 60].

(7) That the unconstitutional portion could be elided without affecting the rest of the Act, and the Act did not otherwise conflict with the State Constitution [B. 60-61].

(8) That "the Governor was without power to appoint Mr. Turley to the term to which he appointed him" [B. 63].

In his dissenting opinion filed the same day, Judge Humphreys dissented primarily from the "redefinition of a constitutionally mandated election to permit only a referendum, so that no one can run in the August election except the appointee," and from "the holding that no member of the General Assembly can serve on the nomination commission" [B. 64]. And he disagreed that the portion of the challenged act held unconstitutional could be elided without destroying the Act [B. 66]. He pointed out that the result of the majority decision "redefining Article 7, § 5 to permit judges and civil officers to remain in office until recalled," would be that "the whole purpose and intent of the Constitution to have government by popular elections has been destroyed" [B. 69].

On the same day judgment was entered according to the majority opinion but in terms of affirming the Chancellor's decision, including his dismissal of the case so far as it sought a declaratory decree as to the validity of the "modified Missouri plan," and the defendants Dunn, Carr, and Pack [B. 72-73].

On March 27, 1973, the respondent, Pack, petitioned for rehearing seeking a further declaratory decree as to what the governor should now do about the vacancy.

On March 29, 1973, the respondent, Turley, also petitioned for rehearing, presenting only one new matter — the same question presented by the respondent Pack.

On April 2, 1973, the petitioner, pursuant to extension of time previously granted [B. 74], filed his petition to rehear. It specifically challenged the competence of the judges, particularly their pecuniary interest in the rendition of the advisory opinion on the constitutionality of the "modified Missouri plan," and added that "The decision of this Court in the manner of its rationale and rendition, deprived the appellant of his property without due process of law and contrary to the law of the land, in violation of Article I, Section 8 of the Constitution of Tennessee and in violation of the 14th Amendment of the Constitution of the United States." In addition, the petitioner challenged the factual accuracy of its statement that this petitioner "must rely on the validity of any statutes, but had relied on the Constitutions of the State and United States, and the Court's misrepresentation or disregard of the holdings in it own prior cases.

On April 6, 1973, the petitioner filed a response to Mr. Turley's petition to rehear and an application to supplement the petitioner's petition. In this combined document, the petitioner specifically reserved his contention that the validity of the statute was not properly in issue, but submitted irrefutable proof from the published minutes of the Constitutional Convention of 1870 that many plans for selection of judges by other than the people had been proposed on the very grounds on which the legislature acted in adopting the "modified Missouri plan" and that all these plans had been rejected in favor of continuing election of judges by the people.

On April 9, 1973, in some unexplained haste [see B. 75] the majority entered an opinion granting the petition to rehear filed by the respondent, Pack [B. 76]. In it the four judges held that "Nothing in our opinion was intended to prevent the Governor from now giving notice to the Appellate Court Nominating Commission of the existence of the vacancy caused by the death of Justice Creson and receiving nominees therefrom all as provided by Chapter 198 of the Public Acts of 1971" [B. 78]. Judgment in essentially the same words was entered the same day [B. 79].

On April 23, 1973, opinions were entered peremptorily denying the petitions to rehear filed by the petitioner and the respondent, Turley [B. 79, 80, 81].

On April 24, 1973, the dissenting judge filed a slightly modified dissenting opinion [B. 82] to replace his previous one [B. 64], and filed a separate opinion on the petitions to rehear [B. 90]. In his separate opinion, while maintaining his contention that the "modified Missouri plan" was unconstitutional, he agreed with respondent, Turley, that if the Constitutional language could be so misconstrued as to validate his appointment, "then there is no reason at all not to read § 17-712 (2) T.C.A. any way that gets the desired result" [B. 92]. Of the petitioner's petition, the dissenting judge said, "If the plain command [of the Constitution] is going to be ignored, there is no reason to hope the discussion giving rise to the command will be noticed," but he thanked the petitioner for submitting the convention history to the court [B. 92].

ARGUMENT

This case arises out of a series of efforts by legislative, executive and judicial officers of Tennessee to evade the clear requirements of the Constitution of Tennessee requiring that judges, like other civil officers, must stand for election or re-election at the times stated in the Constitution.

The purpose of these efforts was to relieve the judges from campaigning for election or re-election against any opposing candidate, by write-in or otherwise.

Question 1. Competency of the Appellate Judges

Each of the three regular judges who sat on the Supreme Court of Tennessee had a pecuniary interest in avoiding the necessity for campaigning for re-election in 1974 and each of them had taken part in an action of original jurisdiction in this matter prior to litigation in the Chancery Court of Davidson County, although their jurisdiction was limited by the State Constitution to "appellate only." Article VI, § 2. Thus each had an interest not only in establishing the validity of the new scheme to eliminate the usual election procedure, but also in destroying the petitioner's successful write-in campaign in the first election to which the new plan was supposed to apply. Thus this cause was one "in the event of which he may be interested" within the meaning of the Constitution and statute law of Tennessee forbade him to sit. Constitution, Article VI, § 11; T.C.A. § 17-201. Each had also, in effect, sat on a court of inferior jurisdiction in the first judicial step of this case, which is also a ground of incompetence under the same constitutional and statutory provisions.

In such case the Constitution and statutes provide only one means for replacing such incompetent judges: certi-

fication of the fact to the governor, who "shall forthwith specially commission the requisite number of men, of law knowledge, for the trial and determination thereof." Article VI, § 11. See also T.C.A. §§ 17-202, 17-203.

In this case, the regular judges, including one who later recused himself from the hearing, undertook themselves to appoint a special judge to sit in the place claimed by the petitioner, and this special judge joined with the others in appointing a fifth special judge to sit in the place of the Chief Justice, who properly recused himself because of interest in the event but improperly failed to certify the same to the governor. Furthermore, one of the special judges had been named and served with process as a defendant in the proceedings in the court below, and is therefore named as a respondent in this petition.

None of the five judges, therefore, was legally sitting under the law of the creation of the Court.

> "The words 'due process of law,' when applied to judicial proceedings, ...'means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is by the law of its creation—to pass upon the subject-matter of the suit ....'"
>
> —*Scott v. McNeal*,
> 154 U.S. 34, 46 (1894)

And in the same case, this Court held that on review of the judgment of the highest court of the state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is not bound

by the State court's construction of a statute of the territory, or of the State. 154 U.S. at 45.

More recently, this Court has said:

> "'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness.... [T]o perform its high function in the best way "justice must satisfy the appearance of justice.' *Offcutt v. United States*, 348 U. S. 11, 14.'" [Emphasis by the Court.]
>
> — *Estes v. Texas*
> 381 U.S. 532, 543 (1965)
> quoting *In re Murchison*, 349 U.S. 133, 136 (1955)

And it is now well established in the opinions of this Court that "once established ... avenues of [appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts," and that the appellate process of the states must meet the standards of both the equal protection and due process clauses of the Fourteenth Amendment. *Mayer v. Chicago*, 404 U.S. 189, 193 (1971), and cases there cited.

See also *Gibson v. Berryhill*, ... U.S. ..., 36 L. Ed. 2d 488 (1973).

Question 2. Due Process

Until the present case, the statute law of Tennessee was clear on its face and as applied by the actual holdings of the courts that where an alleged election was challenged as invalid the proper remedy was an election contest as provided in T.C.A. §§2-1901 *et seq.*, and not *quo warranto*,

and that where such contest was filed in the election of a Supreme Court judge, the venue was in the grand division in which the incumbent is required to reside—in this case in the Western Grand Division, which does not include Davidson County. See T.C.A. §§ 2-1903, 23-2308, *Conner ex rel. Conner*, 67 Tenn. 11 (1874).

With one possible exception, no *quo warranto* had been allowed in a reported case except where the primary defendant was a person actually holding or exercising the powers of the office in question and was alleged to be usurping such office or powers. The single exception, in which this point apparently was not contested either on trial or appeal, was *State ex rel. Bryant v. Maxwell*, 189 Tenn. 187 (1949), in which the original complaint showed the case was brought before the defendant had assumed the office. A comparison of that case with two other cases decided the same day, *Weaver v. Maxwell*, 189 Tenn. 183 (1949), and *Jeffers v. Botts*, 188 Tenn. 694 (1949),[2] show that even on its squarely considered points it was a special case of a sharply limited class in which the election was void on the face of pleadings admitted by demurrer, see *State ex rel. Carey v. Bratton*, 148 Tenn. 174 (1923), discussed in both *Bryant* and *Jeffers*. And the *Weaver* case, arising out of the same incident as the *Bryant* case, re-established that a declaratory judgment would not lie in such a case.

Furthermore, it was well established that no injunction could issue to prevent a person holding a certificate of election, valid on its face, from assuminghis office. *Jeffers v. Botts*, *supra*, and, indeed, the holder of the

[2] The fact that no petition for rehearing was sought in the **Jeffers** case accounts for the fact it was printed in an earlier volume than the other two, which were decided the same day.

certificate of election might seek an injunction against interference by a rival claimant. *Hart v. Pierce*, 169 Tenn. 411 (1935).

In the *Jeffers* case, the Court followed and quoted from the prior case of *Churchwell v. White*, 171 Tenn. 543 (1937), at length, a portion of which clearly sets the rationale ordinarily applied:

> "'As was said in *Hagan v. Henry, supra*, [168 Tenn. 223], by Mr. Justice Swiggart: "Conceding the premise that the certificate of election is *prima facie* title to the office, there does not seem to be any reasonable argument against the rule that this *prima facie* title should prevail until overthrown by final adjudication in the election contest. The holder of the certificate, regularly issued, has the apparent legal right. He, and not the previous incumbent claiming the right to continue in office without color of authority, is the *de facto* officer, and as such is entitled to whatever aid the courts may render in the protection of his possession until the *de jure* officer is ascertained in the election contest. ... Such rule is consistent with the often repeated refusal of this court to concede to courts of chancery the power to hear and determine election contests through the medium of injunction proceedings."

In *State ex rel. Gann v. Malone*, 131 Tenn. 149, 172 (1914), the Court declared that "the general thought underlying the provisions of the constitution bearing on the subject [is] to place and *keep the elective offices of the State in the hands of those elected by the people*, and to *cut down the appointing power to a minimum*." [Emphasis added.]

All of the actions of the legislative, executive and judicial officers in the present case were directly in opposition to that controlling principle of Tennessee constitutional law.

Clearly, the merits in this case should under state law have been decided in an election contest suit alleging the invalidity of the election in a proper venue in West Tennessee, as the petitioner contended throughout the litigation below. Failing that, the petitioner should have been seated without further litigation.

Even assuming litigation in Davidson County would be appropriate, it should have been in one of two ways: (1) by allowing the petitioner to take his seat under his certificate of election and then bringing a proper *quo warranto* alleging that he was a usurper; or (2) after state officials, including the judges of the Supreme Court, prevented that, it might have been pursued under the *quo warranto* brought against the Supreme Court's designees for the seat on relation of the petitioner, which was aborted by the District Attorney General's dismissal of it.

Once it was decided to conglomerate everything in one bushel basket, in the third suit by the District Attorney General, the chancellor might still have made the decision in near accordance with proper *quo warranto* procedure by allowing the petitioner's cross-bill against the persons who were actually usurping the petitioner's office under the illegal appointment of judges of the Supreme Court itself in exercise of powers outside the constitutional limits of their jurisdiction, apparently under color of a patently unconstitutional statute purporting to permit them to exercise a new administrative function of shifting judges outside of their own jurisdictions, although the statute does not purport in terms to include the power to designate persons to sit on the Supreme Court itself. T.C.A. §16-331.

"As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the Amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights."

— *Ex Parte Kemmler*,
136 U.S. 436 (1880)

"Due process of law" was defined in *Kilbourn v. Thompson*, 103 U.S. 168 (1881), by saying:

"It has been repeatedly decided by this court and by others of the highest authority, that this means a trial in a tribunal appointed by law, which tribunal is to be governed by rules of law previously established."

The petitioner was denied due process of state law and equal protection of state law previously established throughout the proceedings below under the foregoing definitions, and by courts without jurisdiction.

Question 3. Republican Form of Government.

The Chancellor's decision purporting to invalidate the petitioner's election turned on a single inference of fact: that the voters had no ***actual*** notice of the election, and this inference was from two stipulated facts only: (1) that the petitioner announced his candidacy only three days before the election, and (2) the great disparity between his reported write-in votes and the balloting on the issue of most interest to most voters—a tax issue [B. 29-30]. No mention was made of the difficulty of write-in voting, of voter interest and other factors that always enter into write-in campaigns, particularly where voting machines are used. Neither did the Chancellor note that the interest in the judicial "recall referendum" which ***was*** on the ballot attracted less than half the number of ballots cast on the tax question. The majority of the judges sitting in the Supreme Court on the case added a strong implication that some official authority had to order an election in order to constitute adequate notice [B. 49-52]. In doing this it misinterpreted the language of its own prior decision in ***Hanover v. Boyd***, 173 Tenn. 426 (1938). That case really stands for the proposition that official writs and publication by the governor "were unimportant details" of the prescribed procedure, because the governor could no longer prescribe the date of election, 173 Tenn. at 434, as he could prior to the Constitution of 1870 (and at the time of ***Barry v. Lauck***, 45 Tenn. 588 (1868), on which the judges sitting in the present case on appeal so strongly relied).

This holding on notice alone, if allowed to stand, would destroy the right of the people to exercise their voting rights under the Republican form of government as set up in Tennessee not only for judges but for other civil officers as well, except at the whim of the governor.

But that was not all, the judges, without any controversy requiring it, issued a self-serving advisory declaratory decree (in violation of numerous precedents including those cited by the Chancellor [B. 25]) in which they upheld statute designed to deprive the voters of their right to elect their judges.

As the dissenting judge pointed out:

"Having said Article 7, § 5 can mean no more popular elections for judges, this of course means that the Legislature can do away with popular elections for civil officers" provided by the same section [B. 86].

But even if it were limited to judicial offices, if accepted as law, the decision would deprive the petitioner and every other qualified lawyer of his right to seek judicial office at the ballot box, but only in the back-room politics that must necessarily take place in the selection and actions of the nominating commission and governor. And this without regard to the number of "write-in" votes he might garner with an earlier announcement for the office next time. Under this advisory opinion, the write-in votes will not even be counted.

Even a "no" vote under the newly approved plan would not give the people any choice. The back-room politics would merely be repeated without even a popular chance for veto of the new appointment for a full two years.

Although it may be that a State by proper amendment of its Constitution may provide for appointment of judges rather than election, the Fourteenth Amendment recognizes the election of judicial officers as a proper part of the republican form of government guaranteed by Article IV, § 4.

And where the people have rejected an effort to accomplish such a change by Constitutional amendment, it is certainly a violation of Tennessee's permissible choice of the details of their republican form of government to try to do it by legislation patently violating the republican constitution already adopted, with self-serving ratification judges in a manner potentially affecting all elective offices.

As the dissenting judge said below:

> "The part of the Plan that does away with the popular election of judges, and substitutes a recall election, is so obviously contrary to the arrangement in our Constitution, as presently written ... that it is diffiuclt to explain why it is unconstitutional. How do you explain the obvious? All you can do is to point out the plain clear words of the Constitution and say, 'read it, and follow it'." [B. 85].

CONCLUSION

Certiorari should be granted in this case on each of the questions to determine whether the procedure, results and the constitution of the tribunals below comport with the applicable requirements of the Constitution of the United States.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

"The United States shall guarantee to every State in this Union a Republican Form of Government ...."

Article IV, §4

"Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of ... liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. ... But when the right to vote at any election for ... the Judicial officers of a State ... is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

Amendment [XIV]

Constitution of Tennessee:

"That no political ... test other than an oath to support to the Constitution of the United States and of this State, shall ever be required as a qualification to any office or public trust under this State."

Article I, §4, Volume I,
Tennessee Code Annotated,
p. 213

"The elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction."

Article I, §5,
Id., p. 214

"The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial."

Article II, §1,
Id., p. 377

"No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."

Article II, §2,
Id., p. 379

"The Supreme Court shall consist of five judges .... The jurisdiction of this Court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law ...."

Article VI, §2,
Id., p. 589

"The Judges of the Supreme Court shall be elected by the qualified voters of the State ...."

Article VI, §3,
Id., p. 617

"No Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested ... or in which he may have presided in any inferior Court, except by consent of all the parties. In case all or any of the Judges of the Supreme Court shall thus be disqualified from presiding on the trial of any cause or causes, the Court, or the Judges thereof, shall certify the same to the Governor of the State, and he shall forthwith specially commission the requisite number of men, of law knowledge, for the trial and determination thereof. The Legislature may by general laws make provisions that special Judges may be appointed, to hold any Courts the Judge of which shall be unable or fail to attend or sit; or to hear any cause in which the Judge may be incompetent."

Article VI, §11,
Id., p. 645

"Elections for judicial and other civil officers shall be held on the first Thursday in August, one thousand eight hundred and seventy, and forever thereafter on the first Thursday in August next preceding the expiration of their respective terms of service. The term of each officer so elected shall be computed from the first day of September next succeeding his election. ... No appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term. Every officer shall hold his office until his successor is elected or appointed, and qualified. No special election shall be held to fill a vacancy

in the office of Judge or District Attorney, but at the time herein fixed for the biennial election of civil officers; and such vacancy shall be filled at the next Biennial election recurring more than thirty days after the vacancy occurs.

Article VII, §5,
Id., p. 676

Tennessee Code Annotated:

2-1207. Blank spaces left under each office—Write in by voters of candidates.— If any qualified citizen has not been nominated, as specified in §2-1205, and has not been requested to be a candidate, as specified in §2-1206, then said names shall not be printed upon said tickets. But, in addition to the names printed upon said tickets, there shall be at least one (1) blank space under each office.

This statute shall apply in counties using voting machines. In such counties, any voter desiring to cast a ballot for a candidate for any office whose name is not on the ballot appearing on the machine may request a printed ballot to be furnished him by the officer of election. This request must be made before going into the machine and said voter after receiving such ballot shall not enter the machine. The election commission in such counties using machines shall furnish a supply of printed ballots in such amount as the commission may deem necessary.

2-1421. Record of votes by secretary of state—Issuance of certificates upon comparison of votes—Commissions issued—Oath administered. — The secretary of state shall compare the number of votes received by each candidate for judge and district attorney-general and shall enter the same in a well-bound book kept

for that purpose, and shall give the person receiving the highest number of votes a certificate of his election, and the governor shall thereupon issue commissions to each judge and district attorney-general upon an estimate and certificate of the votes, as above prescribed. Said judges and district attorneys-general shall be sworn according to law, and then proceed to the discharge of the duties of the office to which they have been elected.

2-1903. Chancery court—Supreme or Appeals judge contests. — Contests for the office of Supreme or Appeals judge shall be tried by one of the chancery courts as such court, and not as a special tribunal, in that grand division in which the incumbent is required to reside.

2-1917. Appellate or Supreme Court judge candidate contesting election—Time for filing reasons. — Any contestant for the office of Supreme judge or judge of the Court of Appeals shall have forty (40) days after the election to file his reasons for contesting the same.

16-331. Supervisory procedures. — In addition to other constitutional, statutory and inherent power, but not restrictive thereof, the Supreme Court shall have the power:

a. To designate and assign temporarily any judge or chancellor to hold, or sit as a member of any court, of comparable dignity or equal or higher level for any good and sufficient reason.

b. To maintain a roster of retired judges who are willing and able to undertake special duties from time to time and to designate or assign them appropriate judicial duties.

c. To require that the executive secretary of the Supreme Court make a careful and continuing survey of the dockets of the circuit, criminal, chancery and other similar courts of record, and to report at periodic intervals to the court, and annually to the general assembly. All such date and reports shall be public documents.

d. To take affirmative and appropriate action to correct or alleviate any imbalance in case loads among the various judicial circuits and chancery divisions of the state.

e. To take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state.

f. To take all such other, further and additional action as may be necessary to the orderly administration of justice within the state, whether or not herein or elsewhere enumerated.

17-103. Election. — The judges of the Supreme Court and Court of Appeals are elected by the qualified voters of the state at large; ....

17-112. Vacancies in office. — Whenever a vacancy, either by death, resignation, or removal, shall occur in the office of a judge of the Supreme Court or Court of Appeals, circuit judge, or chancellor, or judge of a criminal court, or judge of a special court of equal dignity with circuit and chancery courts, the vacancy in such office shall be filled by the qualified voters of the whole state for supreme judges and judges of the Court of Appeals, and of such judicial district for the other judges, at the next biennial election in August, occurring more than thirty (30) days after such vacancy, and in the meantime the governor shall appoint a person learned in the law and

constitutionally qualified to discharge the duties of said office until such election can be had. If a vacancy shall occur in the office of a supreme judge or judge of the Court of Appeals, it shall be filled from the grand division of the state in which the vacancy occurs.

17-113. Writs for special elections. — The governor shall order the election by issuing proper writs of election, giving notice thereof.

In the case of supreme judge or appeals judge, the writs shall issue to all county commissioners of elections in the state, and the notice shall be for at least thirty (30) days, by publication in a newspaper in each grand division of the state. In the case of a circuit judge, chancellor, criminal judge or judge of a special court of equal dignity with circuit and chancery courts, the writs shall issue to the county election commissioners throughout the circuit, chancery division or special district for which the election is to be held, and the notice shall be for at least thirty (30) days by publication in one or more newspapers of the said circuit, chancery division or special district. Whenever the vacancy occurs in sufficient time prior to the election date, notice shall be given and candidates will qualify as in the case of other elections for such office, however, where the vacancy occurs too late for such notice and period of qualification for candidates but more than thirty (30) days before the election, notice will be given at least thirty (30) days as above provided and candidates shall have until twenty-five (25) days before such election in which to qualify as provided by law either as a party nominee or as an independent candidate. [Code 1858, §§312-314 (deriv. Acts 1853-1854, ch. 32, §6); Acts 1895, ch. 76, §6; impl. am. Acts 1907, ch. 436; Shan., §§382-384, 6316; mod. Code 1932, §§638-640, 10609; Acts 1969, ch. 138, §2.]

17-201. Grounds of incompetency. — No judge or chancellor shall be competent, except by consent of all parties, to sit in the following cases:

(1) Where he is interested in the event of any cause.

(2) ...

(3) ...

(4) Or has presided on the trial in an inferior court ....

17-202. Incompetency of Supreme Court judges. — The judges of the Supreme Court, within the first week of each term, or as soon thereafter as the fact shall come to their knowledge, shall certify to the governor all cases upon the docket in which either of them is incompetent to sit, upon the receipt of which certificate, the governor shall appoint and commission the requisite number of competent lawyers to dispose of said causes.

17-203. Powers of special Supreme Court judges. — The special judges so commissioned shall hear and determine the causes in the commission set forth, and all such other causes during the same term, and shall have the same power and authority in those causes as the regular judges of the court.

17-226. Contested elections — Temporary judge. — The governor shall appoint a temporary judge, chancellor, or attorney-general in all cases where a contest shall arise in the election of any of said officers, and they shall hold said offices, and have all the powers and jurisdiction pertaining thereto, until the contest is judicially determined and the regularly elected officers duly qualified and commissioned; and they are clothed with the same power, and

shall receive the same compensation, as is allowed said officer in other cases, to be paid out of the state treasury upon a warrant of the director of accounts.

17-701. Declaration of purpose and intent. — It is the declared purpose and intent of the general assembly of Tennessee by the passage of this chapter to assist the governor in finding and appointing the best qualified persons available for service on the appellate courts of Tennessee and to assist the electorate of Tennessee to elect the best qualified persons to said courts; to insulate the justices and judges of said courts from political influence and pressure; to improve the administration of justice; to enhance the prestige of and respect for the appellate courts by eliminating the necessity of political activities by appellate justices and judges; and to make the appellate courts of Tennessee "nonpolitical."

17-702. Appellate court nominating commission established — Members — Appointment — Initial terms. — There is hereby established as a part of the judicial department of the state of Tennessee an appellate court nominating commission to be composed of nine members as follows:

(1) Three (3) members, only one (1) of whom may be a licenses attorney, to be appointed by the governor, one from each grand division of the state of Tennessee. The initial term of the member from west Tennessee shall be for two (2) years; the initial term of the member from middle Tennessee shall be for four (4) years; and the initial term of the member from east Tennessee shall be for six (6) years.

(2) Three (3) members, licenses attorneys, one (1) from each grand division of the state of Tennessee, to be elected by a referendum within each grand division of

licensed practicing attorneys in the state of Tennessee. Each member of the commission elected under this section shall reside in the grand division which he represents. The referendum shall be conducted by the secretary of state by mailing a ballot to all licensed practicing attorneys within each grand division, the ballot to be returned to the secretary of state within fifteen (15) days of its mailing. The ballot shall contain the names of those licenses attorneys within each grand division who have been nominated for consideration by petition containing the signatures of twenty-five (25) licensed attorneys. The deadline for the nominations of the initial election shall be June 15, 1971, and the referendum shall be conducted as soon as practicable thereafter with the results certified to the governor. In any subsequent referendum to fill a vacancy, it shall be held as soon as practicable after the commission has notified the secretary of state that a vacancy exists. The initial term of the member from west Tennessee shall be four (4) years; the one from middle Tennessee shall be six (6) years; and the one from east Tennessee shall be two (2) years.

(3) Three (3) members of the general assembly of Tennessee, one from each grand division of Tennessee, to be elected by the general assembly of Tennessee in joint session; at least one (1) of the members shall be from the senate and at least one (1) of the members shall be from the house of representatives.

The members, or any of them, may or may not be licensed attorneys. The initial term of the member from west Tennessee shall be six (6) years; the initial term of the member from middle Tennessee shall be two (2) years; and the initial term of the member from east Tennessee shall be four (4) years. The membership of the commission from the general assembly shall cease at such time as membership in the general assembly ceases.

17-703. Members of commission—Residence requirement. — All members of the appellate court nominating commission shall be residents of the state of Tennessee.

17-704. Members of commission—Salaried office holders and political party officers ineligible—Exception. — No member of the appellate court nominating commission shall be a salaried office holder of the state of Tennessee or the United States of America nor shall any member of said commission hold any office in any political party or political organization; provided, however, members of the national guard and/or members of any armed forces reserve organization shall not be considered as salaried office holders.

Any member of the commission becoming a salaried office holder of the state of Tennessee or the United States of America or accepting any office in any political party or political organization ipso facto vacates his office as a member of the commission.

The provisions of this section shall not apply to the members of the general assembly of Tennessee.

17-705. Beginning of terms of members—Organization—When chief justice unable to preside— Employment of clerical help—Expenses. — The terms of office of all the members of the appellate court nominating commission shall begin as of July 1, 1971. As soon as practicable after July 1, 1971, an organizational meeting of the commission shall be held in Nashville, Tennessee, at a place and at a time to be designated by the chief justice of the Tennessee Supreme Court.

At the first organizational meeting the chief justice of the Supreme Court shall preside as temporary chairman and a permanent chairman shall be elected from the membership of the commission. The commission may elect such other officers as it deems necessary and proper; and may adopt and from time to time amend by-laws and rules of procedure for the conduct of its business and discharge of its duties.

If for any reason the chief justice is unable to convene the commission and/or serve as temporary chairman, he may designate some other member of the Tennessee Supreme Court to act in his place and stead.

The commission may employ such secretarial and clerical assistance as it deems necessary. All necessary expense authorized by the commissioners or incurred by them in the performance of their duties except the expense of food, lodging, and travel which is provided for in §17-708 shall be paid for or the commissioners reimbursed therefor upon vouchers approved by the executive secretary of the Supreme Court.

17-706. Terms of members—Ineligible to succeed selves. — After the first or initial term all members of the commission shall serve six (6) year terms. No member who has served as much as four (4) years on the commission shall be eligible for reelection or reappointment.

17-707. Vacancies on commission. — All vacancies on the nominating commission shall be filled as follows:

(1) The vacancies in the offices of commissioners named by the governor shall be filled by the governor and such appointees shall serve the remainder of the term of their predecessors.

(2) Vacancies in the offices of commissioners elected by the licensed practicing attorneys shall be filled by referendum as provided in §17-702, subsection 2.

(3) Vacancies in the offices of commissioners elected by the general assembly of Tennessee shall be filled by the general assembly at its next meeting but interim commissioners may be named by a concurring vote of the speaker of the senate and speaker of the house of representatives to serve until the general assembly elects their successors to serve the remainder of the term.

17-708. Service of members without compensation—Expenses.— Members of the appellate court nominating commission shall not receive any compensation for their services but shall be reimbursed for their food, lodging, and travel as follows:

(1) The same allowance for each day that the committee meets for the conduct of its business as received by members of the general assembly for committee meetings.

(2) The same mileage allowance for travel as received by members of the general assembly for attending committee meetings.

17-709. Judicial vacancy—Public meeting of commission—Notice—Suggestions of nominees from public—Statements by candidates—Additional meetings—Certification of nominees.— When a vacancy occurs after July 1, 1971, in the office of justice of the Supreme Court, judge of the Court of Appeals, or judge of the Court of Criminal Appeals, the appellate court nominating commission shall, at the earliest practicable date, hold a public meeting in the grand division of Tennessee from which such vacancy is to be filled. If the judicial vacancy is to be filled from the state at large, the meeting will be held in Nashville, Tennessee.

Notice of the time, place and purpose of the meeting shall be given by newspapers, radio news, and television news and by such other means as the commission deems proper.

Any member of the public, both lay and attorney, shall be entitled to attend said meeting and express orally or in writing suggestions of possible nominees and/or his or her approval of or objections to any suggested nominee for said judicial vacancy. Any licensed attorney may appear and make a statement, oral or written, in support of his or her own nomination.

After one (1) public hearing, the nominating commission may hold such additional private or public meetings as it deems necessary. The commission shall make independent investigation and inquiry to determine the qualifications of possible nominees for the judicial vacancy and shall endeavor to encourage qualified attorneys to accept nomination and agree to serve if appointed to the judicial vacancy.

As soon as practicable and not later than thirty (30) days from receipt of written notice from the governor that a vacancy has occurred, the nominating commission, in public or private meeting, by a majority vote shall select three (3) persons whom the commission deems best qualified and available to fill the vacancy and certify the names of said three (3) persons to the governor as nominees for the judicial vacancy.

17-710. Qualifications of judicial nominees.— (1) All nominees of the appellate court nominating commission must be attorneys licensed to practice in the state of Tennessee and fully qualified under the constitution and statutes of Tennessee to fill the office for which they are nominated.

(2) No candidate who has been defeated in any election held under this chapter shall be eligible for renomination to the office for which he was defeated until after one (1) August biennial general election has intervened.

17-711. Members of commission ineligible for judicial nominations. — No member of the nominating commission shall be eligible to be nominated by the appellate court nominating commission during his (her) tenure of office and until he (or she) shall have been out of office as much as four (4) years.

17-712. Judicial appointments — Expiration of terms of appointees — Rejection of all nominees — Additional nominations. — (1) When a vacancy occurs in the office of justice of the Supreme Court, judge of the Court of Appeals, or judge of the Court of Criminal Appeals of Tennessee after July 1, 1971, by death, resignation, or otherwise, the governor of Tennessee shall fill such vacancy by appointing one (1) of the three (3) persons nominated by the appellate court nominating commission.

(2) The terms of all justices or judges appointed under this act shall expire August 31 following the next August biennial general election recurring more than thirty (30) days after the vacancy.

However, if no one (1) of the three (3) nominees is satisfactory to the governor, he may reject all three (3) nominations and require the nominating commission to submit three (3) additional names from which he shall make his appointment if one (1) of the additional nominees is satisfactory to the governor. If not, he shall require further nominations in groups of three (3) until he is able to make his appointment.

17-713. Appointment when commission fails to nominate. — If the nominating commission does not furnish a list of three (3) nominees to the governor within thirty (30) days after written notice from the governor that a vacancy has occurred, the governor may appoint any qualified licensed attorney of his choosing to the vacancy.

17-714. Declaration of candidacy for reelection to fill unexpired term—Time of filing—Exception—Form of ballot—Rejection of candidate—Appointment. — (1) Any appellate justice or judge, whether appointed under the provisions of this chapter or prior thereto, who seeks election to fill the unexpired term of his predecessor, shall file with the secretary of the state board of elections commission a written declaration of his candidacy to fill such unexpired term not later than 12:00 o'clock noon prevailing time on the first Thursday in June preceding the next August biennial general election recurring more than thirty (30) days after the vacancy.

If such declaration is timely filed, only the names of said candidate, without party designation, will be submitted to the electorate in Tennessee in said August biennial general election. The general election officials in all counties of Tennessee shall cause the following to be placed on the ballot to be voted on: "Shall (Name of Candidate) be elected and retained in office as (Name of Office) ? Vote Yes or No ."

If a majority of those voting on the question vote in favor of electing the candidate, the candidate shall be declared duly elected to the office for the remainder of the term of his predecessor and given a certificate of election.

If a majority or one-half (1/2) of those voting on the question vote against retaining him in office, than a vacancy

shall exist as of September 1 following the said August biennial general election and such vacancy shall be filled by appointment of the governor from a group of three (3) nominees submitted by the appellate court nominating commission as provided in §17-712.

(2) If an appointment of a justice or judge to a vacancy is made under this chapter after the last Thursday in May preceding the next August biennial general election recurring more than (30) days after the vacancy, the qualifying date prescribed in subsection (1) of this section shall not apply. In such case the qualifying date for election to fill the unexpired term will be 12:00 o'clock noon prevailing time on the first Thursday recurring one (1) full week after the appointment.

17-715. Declaration of candidacy for reelection for full term—Time of filing—Exception—Form of ballot—Rejection of candidate—Appointment.—(1) When any incumbent justice of the Supreme Court, judge of the Court of Appeals, or judge of the Court of Criminal Appeals, whether appointed and/or elected under the provisions of this chapter or otherwise, seeks election or reelection for a full eight (8) year term, he shall file a written declaration of his candidacy with the secretary of the state board of elections commission not later than 12:00 o'clock noon prevailing time on the first Thursday in June immediately preceding the end of his term. If such a declaration is timely filed, only the name of the incumbent, without party designation, shall be placed on the judicial ballot in the August election as a candidate for said office. The general election officials in all counties of Tennessee shall cause the following to be placed on the ballot to be voted upon "Shall (Name of Candidate) be elected and retained in office as (Justice)/(Judge) of the (Name of Court) ? Vote Yes or No ."

If a majority or one-half (1/2) of those voting on the question vote in favor of reelecting the incumbent candidate, the candidate shall be declared to be duly elected to the office for a full term of eight (8) years and given a certificate of election.

If a majority of those voting on the question vote against reelecting the incumbent candidate, a vacancy in the office shall be declared and the vacancy shall be filled in the manner provided in §17-712.

(2) If the incumbent justice or judge seeking election to a full eight (8) year term was appointed after the last Thursday in May immediately preceding the end of the term, the qualifying date for such incumbent will be 12:00 o'clock noon prevailing time on the first Thursday occurring one (1) full week after the appointment.

17-716. Failure to seek reelection—Nomination and appointment subject to election—Exception—Rejection of candidate—Appointment. — (1) If any incumbent justice or judge of the Supreme Court, Court of Appeals or Court of Criminal Appeals, whether appointed or elected, fails to file a declaration of candidacy for election to an unexpired term or to a full eight (8) year term within the time prescribed by §17-714 and/or §17-715, or if such justice or judge, after the qualifying date, withdraws as a candidate after filing, a vacancy is created in his office at the expiration of the incumbent's term and effective September 1 following. In this event the nominating commission shall furnish a list of nominees for the office to the governor as provided by §17-709. From said nominees as provided in §17-712 (1), the governor shall appoint a successor to fill the vacancy effective September 1 following. The appointment will be subject to the action of the electorate of

Tennessee in the August biennial general election. The appointee must file a declaration of his candidacy and be voted on as provided in §§17-714 and 17-715.

(2) If the vacancy occurs more than thirty (30) days prior to the August biennial general election immediately preceding the end of the term, the appointee shall be voted on in said election in the manner provided in §§17-714 and 17-715.

If a majority or one-half (1/2) of those voting on the question vote in favor of electing said candidate, he shall be declared to be duly elected to the office for the remainder of the term or for a full term of eight (8) years as the case may be beginning September 1 following and given a certificate of election.

If a majority of those voting on the question vote against electing said candidate, the candidate shall not take office on September 1 following. The vacancy in the office shall continue and the vacancy shall be filled as provided in §17-712.

(3) If the vacancy occurs less than thirty-one (31) days prior to the August biennial general election, the appointee will not be voted on in said election and will take office September 1 following. His term shall be as provided in subsection (2) of §17-712.

23-2801. Grounds for action. — An action lies in the name of the state against the person or corporation offending, in the following cases:

(1) Whenever any person unlawfully holds or exercises any public office or franchise within this state, or any office in any corporation created by the laws of this state.

(2) Whenever any public officer has done, or suffered to be done, any act which works a forfeiture of his office ....

23-2804. Naming proper claimant to office—Adjudication of rights. — Whenever the action is brought against a person for usurping an office, in addition to the other allegations, the name of the person rightfully entitled to the office, with a statement of his right thereto, may be added, and the trial should, if practicable, determine the right of the contesting parties.

23-2805. Judgment for claimant to office. — If judgment is rendered in favor of such claimant, the court may order the defendant to deliver to him, upon his qualifying as required by law, all books and papers belonging to the office in his (defendant's) custody, or under his control, and such claimant may thereupon proceed to exercise the functions of the office.

23-2806. Damages for usurpation of office. — Such claimant, on his recovery of the office, may also, at any time within one (1) year thereafter, bring suit against the defendant, and recover the damages he has sustained by reason of the act of the defendant.

23-2807. Adjudication among several claimants to office. — When several persons claim to be entitled to the same office or franchise, they may be all made defendants, so as to determine their respective rights.

23-2808. Election contests. — The validity of any election which may be contested under this Code cannot be tried under the provisions of this chapter.

23-2809. Officers entitled to bring suit. — The suit is brought by the attorney-general for the district or county, when directed so to do by the general assembly, or by the governor and attorney-general of the state concurring.

23-2810. Suit on relation of private individual. — It is also brought on the information of any person, upon such person giving security for the costs of the proceedings, to be approved by the clerk of the court in which the bill is filed. When the suit is brought at the relation of a private individual, it shall be so stated in the bill and proceedings, and such individual is responsible for costs in case they are not adjudged against the defendant.

23-2811. Filing of bill—Venue. — The suit is brought by bill in equity, filed either in the circuit or chancery court of the county in which the office is usurped, or held, or the corporation or supposed corporation holds its meetings or has its principal place of business.

23-2812. Contents of bill. — The bill shall set forth briefly, and without technical forms, the grounds upon which the suit is instituted, and the suit shall be conducted as other suits in equity.

23-2813. Extraordinary process. — The court is authorized, upon the filing of the bill, properly verified, in all proper cases, to grant attachments and injunctions, and appoint receivers to effect the ends of justice, and to make all such orders, rules, and decrees, according to the practice of a court of chancery, as may be necessary to accomplish the objects had in view.

23-2814. Answer—Evidence in criminal actions. —The defendants appear and answer the bill in the usual way, and such answer shall not be read against them in any criminal prosecution brought against them, or either of them.

23-2815. Issues of fact. — Such issues of fact as may become necessary to try by jury in the progress of the cause, shall be made up under the direction of the court, and submitted to a jury impaneled forthwith.

23-2816. Judgment of exclusion from office or franchise. — When a defendant, whether a natural person or a corporation, is adjudged guilty of usurping, unlawfully holding, or exercising any office or franchise, judgment shall be rendered that such defendant be excluded from the office or franchise, and that he pay the costs.

23-2821. Appeal. — Either party is entitled to take the case to the proper appellate court for the correction of errors, as in other chancery cases.

Supreme Court, U. S.
FILED
JUL 20 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-149

ROBERT L. TAYLOR,

Petitioner,

v.

STATE OF TENNESSEE by THOMAS H. SHRIVER, *ex rel.* THOMAS A. HIGGINS; STATE OF TENNESSEE *ex rel.* JOHN J. THOMASON; DAVID M. PACK, Attorney General and Reporter of the STATE OF TENNESSEE; THOMAS F. TURLEY, JR.; ROBERT E. COOPER; T. MACK BLACKBURN; HOWARD KESLEY; and JOHN W. WILSON,

Respondents.

APPENDIX "B" TO PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

CECIL D. BRANSTETTER,
216 Third Avenue North,
Nashville, Tennessee 37201,

Attorney for Petitioner.

OF COUNSEL:

PHILIP M. CARDEN

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

7-18-73-100

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B. 1

Order

IN RE: THE VACANCY THAT EXISTS ON THE COURT

FILED
SEP 6 1972
RAMSEY LEATHERS
Clerk
SUPREME COURT

ORDER

With deep regret we take note there is a vacancy on this Court created by the death of Mr. Justice Larry Creson, occurring on June 19, 1972, during the time this Court was in adjournment.

The Court has been presented with claims for the vacant seat on the Court by the Honorable Thomas F. Turley, Jr. and the Honorable Robert L. Taylor, of Memphis, each of whom has filed documents, briefs and arguments in support thereof. These documents, briefs and written arguments are made appendices to this order.

Under these facts there is presented to this Court by each of the claimants a substantial claim of title to the office created by virtue of the vacancy existing on this Court, with the result that there is a contest between the claimants as to which has lawful title to this office. This Court having appellate jurisdiction only is not permitted to resolve these conflicting claims.

This also presents to this Court a matter involving great public interest. It is in the public interest that [fol. 2] normal judicial process continue in order that there be an orderly and efficient administration of justice in the courts of this State, which as related to these claims require there be no doubt of the legal title of the successful claimant to the office, in order that there be no question as to the validity of the Court's judgments,

nor that there even be an arguable cloud placed on the administration of justice in this State.

This Court has inherent power and a duty to act to protect the continued orderly administration of justice and the validity of its judgments, and under such power this order is entered.

Accordingly, it is ORDERED by this Court that the claimants, the Honorable Thomas F. Turley, Jr., and the Honorable Robert L. Taylor, are restrained from taking a seat on this Court until their claims have been adjudicated on their merits to final judgment under the usual processes of the law.

The law provides orderly and proper methods within our judicial system whereby determination of these conflicting claims can be resolved at the same time fully protecting the rights of the claimants and the rights of the people of Tennessee.

This continued orderly administration of justice in this State requires this Court to have five members. The legislature has provided for such contingency as this by enactment of T.C.A. § 17-226, authorizing the [fol. 3] Governor to appoint a temporary judge. Under authority of this statute the Honorable Winfield Dunn, Governor of Tennessee, should appoint a temporary judge, other than either of the claimants, to this Court to sit during the pendency of this litigation.

IT IS SO ORDERED, this 6th day of September, 1972.

/s/ Ross W. Dyer
Chief Justice

/s/ Chester C. Chattin
Associate Justice

/s/ Allison B. Humphreys
Associate Justice

/s/ George F. McCanless
Associate Justice

RECORDED IN MINUTE BOOK 49, PAGE 118

MINUTES OF THE SUPREME COURT
DECEMBER TERM, 1971

Under authority of T.C.A. § 16-331 the Honorable Robert E. Cooper, a judge of the Court of Appeals, is appointed by the Court to sit as a member of this Court during its session in Nashville beginning September 6, 1972.

Order

IN RE:
THE VACANCY THAT
EXISTS ON THE COURT

FILED
SEP 8 1972
RAMSEY LEATHERS
Clerk
SUPREME COURT

ORDER

In this matter the Order entered in Minute Book 49, Page 117, dated September 6, 1972, is amended by adding at the end of the second sentence of the second paragraph, the following words:

"but need not be copied herein."

so that said sentence reads:

"These documents, briefs and written arguments are made appendices to this Order but need not be copied herein."

IT IS SO ORDERED.

PER CURIAM.

B. 5

Order

Decree Entered September 26, 1972 in M. B. 85, page 250

IN THE CHANCERY COURT FOR DAVIDSON COUNTY PART II AT NASHVILLE

STATE OF TENNESSEE, ex rel JOHN J. THOMASON VS. ROBERT L. TAYLOR, et al	NO. A-1812
STATE OF TENNESSEE by THOMAS H. SHRIVER, ex rel ROBERT L. TAYLOR VS. ROBERT E. COOPER, et al	NO. A-1812-A
STATE OF TENNESSEE by THOMAS H. SHRIVER, ex rel THOMAS A. HIGGINS VS. WINFIELD DUNN, et al	NO. A-1812-B

ORDER

In this case it appears to the Court that the State of Tennessee by Thomas H. Shriver, District Attorney General for the Tenth Judicial Circuit, has moved to dismiss Cases Nos. A-1812 and A-1812-A and has stated in open Court that the rights and interests, if any, of the parties in both suits and the interests of the citizens of the State of Tennessee can best be served by a dismissal of said

suits and by litigation of the issues raised in a suit heretofore filed by the said District Attorney General on relation of *Thomas A. Higgins vs. Winfield Dunn, et al*; and it further appears to the Court from a consideration of the entire record that the motion is well taken and must be granted.

[fol. 2] It further appears that in Case No. A-1812-B the State of Tennessee acting by and through Thomas H. Shriver, District Attorney General for the Tenth Judicial Circuit, upon relation of Thomas A. Higgins, has prayed for an order against the defendants, Thomas F. Turley, Jr. and Robert L. Taylor, restraining them from taking a seat on the Supreme Court of Tennessee until their claims have been adjudicated on the merits to final judgment under the usual process of the law; and it further appears to the Court upon a consideration of the entire record that the prayer for a restraining order is well taken and should be granted.

It is, therefore, ORDERED, ADJUDGED and DECREED:

1. That upon the motion of Thomas H. Shriver, District Attorney General for the Tenth Judicial Circuit, Cases Nos. A-1812 and A-1812-A be and the same are hereby dismissed and the costs in each case are taxed against the relator therein and the surety on the relator's bond in each case, for all of which execution may issue, if necessary.

2. That the defendants, Thomas F. Turley, Jr. and Robert L. Taylor, be and they each hereby are restrained from taking a seat on the Supreme Court of Tennessee until their claims, if any, to the office of Associate Justice of the Supreme Court of Tennessee have been adjudicated on the merits to final judgment under the usual process of the law, upon plaintiff making bond in the amount of $1,000.00.

B. 7

Order

ENTER this September 26, 1972, at 3:20 p.m.

/s/ Frank F. Drowota, III
Frank F. Drowota, III, Chancellor

Approved For Entry:

/s/ Thomas H. Shriver
Thomas H. Shriver, District Attorney General
Tenth Judicial District, State of Tennessee

MINUTES OF THE SUPREME COURT,
SEPTEMBER TERM 1972, AT KNOXVILLE
MONDAY, OCTOBER 2, 1972

IN THE SUPREME COURT OF TENNESSEE,
AT KNOXVILLE

FILED
NOV 13 1972
RAMSEY LEATHERS
Clerk
SUPREME COURT

ORDER

Under authority of T.C.A. 16-331, for reasons sufficient to the Court, the Honorable John W. Wilson, Circuit Judge in Shelby County, Tennessee, is designated to sit as a member of this Court during the term in Knoxville, October Session, 1972.

B. 8

Order

Ross W. Dyer, CJ
Chester C. Chattin, J
Allison Humphreys
George F. McCanless

Office of CLERK OF SUPREME COURT
For the Eastern Division of the State of Tennessee

I, JOHN A. PARKER, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Order Designating the Honorable John W. Wilson to sit as a member of the Supreme Court as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 24th day of October, 1972

/s/ John A. Parker, Clerk

Decree Entered October 6, 1972 in M. B. 85, page 287

IN THE CHANCERY COURT OF DAVIDSON COUNTY PART II AT NASHVILLE

STATE OF TENNESSEE, ex rel.
VS.
ROBERT E. COOPER, et al.
} Civil Action No. A-1812-A

STATE OF TENNESSEE, ex rel.
VS.
WINFIELD DUNN, et al.
} Civil Action No. A-1812-B

ORDER

These cases came on to be heard on October 3, 1972, on the petition to rehear filed by Robert L. Taylor, and on the motion of Robert L. Taylor to increase the injunction bond in Civil Action No. A-1812-B, statement of counsel, and the entire record, from all of which it appears that the petition to rehear and the motion to increase the injunction bond in Civil Action No. A-1812-B should be denied.

In Civil Action No. A-1812-B the District Attorney General moved in open Court to be permitted to amend Paragraphs I and VII of the amended complaint in Civil Action No. A-1812-B and it appears to the Court that the motion is well taken and should be granted.

It is, therefore, ORDERED, ADJUDGED and DECREED:

1. That the petition to rehear filed by Robert L. Taylor in these cases be denied.

2. That the motion to increase the injunction bond in Civil Action No. A-1812-B be denied.

3. That the motion of the District Attorney General to be permitted to amend the amended complaint [fol. 2] be granted, and paragraphs I and VII of the amended complaint in Civil Action No. A-1812-B shall be deemed amended by the entry of this order so as to allege the following:

"I.

This suit is brought pursuant to Section 23-2801, et seq., Tennessee Code Annotated, and Section 23-1101, et seq., Tennessee Code Annotated, and specifically to determine whether either the defendants, Thomas F. Turley, Jr. or Robert L. Taylor, unlawfully hold or claim to hold a public office within this State or are persons who claim to be entitled to the same office within this State and whether either the defendants, Winfield Dunn or Joe C. Carr, have unlawfully exercised a public office within this State all as set forth more particularly in the amended complaint.

VII.

The defendants, Thomas F. Turley, Jr. and Robert L. Taylor, are residents of Shelby County, Tennessee, and are made parties to this complaint pursuant to the provisions of Section 23-2804 and Section 23-2807, Tennessee Code Annotated, because each of them is unlawfully asserting that he is rightfully entitled to hold and exercise the office of Associate Justice of the Supreme Court of Tennessee, rendered vacant by the death of the Honorable Larry B. Creson."

Order

To the foregoing action of the Court in denying the petition to rehear in Civil Action No. A-1812-A, Robert L. Taylor duly excepts and prays an appeal in Civil Action No. A-1812-A, which is granted upon the condition that it is perfected within the time and in the manner as prescribed by law.

To the foregoing action of the Court in Civil Action No. A-1812-B, Robert L. Taylor duly excepts and prays an appeal, which is denied at this time.

/s/ Frank F. Drowota, III
Frank F. Drowota, III, Chancellor

Approved For Entry:

/s/ Thomas H. Shriver
Thomas H. Shriver, District Attorney General

B. 12

Order

Decree Entered October 9, 1972 in M. B. 85, page 289

IN THE CHANCERY COURT OF DAVIDSON COUNTY PART II AT NASHVILLE

STATE OF TENNESSEE, ex rel. VS. WINFIELD DUNN, et al.	Civil Action No. A-1812-B

ORDER

This case came on to be heard on October 6, 1972, on the motion of the defendant, Robert L. Taylor, to dispose of the first eight defenses included in his answer, and on the motions to dismiss filed on behalf of the defendants, Winfield Dunn and Joe C. Carr, and on the motion of the defendant, Thomas F. Turley, Jr., to dismiss the counter claim and cross bill filed by Robert L. Taylor and on the motion of the State of Tennessee to enter an order pursuant to Rule 16, Tennessee Rules of Civil Procedure, statement of counsel, and the entire record, from all of which it appears that the motion of the defendant, Robert L. Taylor, to dispose of the first eight defenses included in his answer is not well taken and should be denied; it further appears that the motions to dismiss filed on behalf of the defendants, Winfield Dunn and Joe C. Carr, are not well taken and should be denied; and it further appears that the motion of Thomas F. Turley, Jr. to dismiss the counterclaim and cross bill filed by Robert L. Taylor is well taken and should be granted; and it further appears that action on the motion filed by the State of Tennessee to enter an order pursuant to Rule 16, Tennessee Rules of Civil Procedure, should be reserved at this time.

Order

It is, therefore, ORDERED, ADJUDGED and DECREED:

1. That the motion of the defendant, Robert L. Taylor, to dispose of the first eight defenses included [fol. 2] in his answer be denied, and the said first eight defenses are overruled at this time with leave to said defendant to rely on the said defenses at the trial of this case.

2. That the motion to dismiss filed on behalf of the defendant, Winfield Dunn, be denied, with leave to incorporate the grounds contained in the motion in the defendant's answer and with leave to rely on the said grounds at the trial of this case.

3. That the motion to dismiss filed on behalf of the defendant, Joe C. Carr, be denied, with leave to incorporate the grounds contained in the motion in the defendant's answer and with leave to rely on the said grounds at the trial of this case.

4. That the motion of the defendant, Thomas F. Turley, Jr. to dismiss the counterclaim and cross bill filed by Robert L. Taylor be granted and the said counterclaim and cross bill is herewith dismissed as to all of the parties named as cross-defendants. The Court costs incurred in connection with the counterclaim and cross bill filed by Robert L. Taylor are taxed against the said Robert L. Taylor, for which execution may issue, if necessary.

5. That the action on the motion of the State of Tennessee to enter an order pursuant to Rule 16, Tennessee Rules of Civil Procedure, be reserved at this time.

To the foregoing action of the Court Robert L. Taylor duly excepts and prays an appeal, which is denied at this time.

Memorandum

/s/ Frank F. Drowota, III
Frank F. Drowota, III, Chancellor

Approved For Entry:

/s/ Thomas H. Shriver
Thomas H. Shriver, District Attorney General

/s/ Thomas A. Higgins
Thomas A. Higgins, Relator

IN THE CHANCERY COURT, PART TWO AT NASHVILLE

STATE OF TENNESSEE BY
THOMAS H. SHRIVER,
DISTRICT ATTORNEY GENERAL,
ON RELATION OF
THOMAS A. HIGGINS,
Plaintiff

VS. NO. A-1812-B

WINFIELD DUNN,
JOE C. CARR,
THOMAS F. TURLEY, JR.
ROBERT L. TAYLOR and
DAVID M. PACK
Defendants

FILED
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R. L. BARRETT, Clerk
and Master
Davidson Co. Chancery C
/s/ Emily Lord, D.C. &

MEMORANDUM

This is a statutory quo warranto proceeding brought by and through Thomas H. Shriver, District Attorney General for the Tenth Judicial Circuit of Tennessee, under the authority of Sections 23-2801, 2810, T.C.A., to try title to the office of Associate Justice of the Supreme Court of Tennessee.

[fol. 2] FACTS

A full presentation of the facts is contained in the pleadings, stipulations and admissions of fact, and exhibits. The relevant facts are summarized below.

On June 19, 1972, Mr. Justice Larry B. Creson of Memphis died, thereby creating a vacancy on the Tennessee Supreme Court. On June 20, 1972, the Governor of Tennessee, the Honorable Winfield Dunn, gave official notice of the vacancy to Mr. John J. Thomason, Chairman of the Tennessee Appellate Court Nominating Commission, and requested him to initiate Commission proceedings to nominate three persons eligible for appointment to fill the existing vacancy.

On July 18, 1972, the Commission selected three persons from the list of those considered and certified their names to the Governor. Those certified were Charles W. Miles, III, Thomas F. Turley, Jr., and Mark Anthony Walker, Jr. On July 21, 1972, the Governor announced that he had selected Thomas F. Turley, Jr., to fill the Supreme Court vacancy effective September 1, 1972.

[fol. 3] On the afternoon of July 31, 1972, Robert L. Taylor announced his candidacy for Justice of the Supreme Court. The coverage by the news media

of the announcement and the Governor's response that he was not qualified and was ineligible, may be found in Exhibit 6A. After the August 3, 1972, General Election, Taylor announced that he had been duly elected to the associate justiceship and that he would fill the office.

On August 18, 1972, the Secretary of State of Tennessee, the Honorable Joe C. Carr, issued a Certificate of Election to Robert L. Taylor, which certified that he had been "duly elected Judge, Western Division, Supreme Court of Tennessee in the August 3, 1972, General Election."

On August 19, 1972, the Governor issued to Thomas F. Turley, Jr., a commission appointing him "Justice of the Supreme Court of the State of Tennessee, effective September 1, 1972, to serve until September 1, 1974, and until he shall have been elected and retained in office pursuant to Section 17-715, Tennessee Code Annotated."

On August 23, 1972, a complaint in quo warranto was filed in this court by Thomas H. Shriver against [fol. 4] Robert L. Taylor and Secretary of State, Joe C. Carr. On the same date, Robert L. Taylor petitioned the Honorable L. F. Stewart, Chancellor of the Twelfth Chancery Division, to administer the oath of office. The Chancellor granted the petition and administered the oath of office to Taylor.

On September 1, 1972, Taylor presented himself at the office in Memphis provided for the Associate Justice, Western Division. He also presented himself at the office of the Supreme Court in Jackson and announced he was ready to assume the duties as Supreme Court Justice.

On the morning of September 6, 1972, Turley and Taylor appeared at the Supreme Court Building in Nashville. That

morning the Honorable Ross W. Dyer, Chief Justice, issued an order restraining them both from "taking a seat on this Court until their claims have been adjudicated on the merits to final judgment under the usual processes of law." On the following day, September 7, 1972, a bill of complaint in the nature of quo warranto was filed by Thomas H. Shriver on relation of Robert L. Taylor against Thomas F. Turley, Jr., and others.

[fol. 5] On September 21, 1972, District Attorney General Shriver brought this present suit on relation of Thomas A. Higgins against Governor Winfield Dunn and Secretary of State, Joe C. Carr. On the same day General Shriver filed a motion to dismiss the two suits he had previously brought on the grounds that the rights and interests of the parties in the first two suits and the interests of the citizens of the State could best be served by dismissal of the earlier suits and by litigating the issues raised in A-1812-B.

General Shriver's motion to dismiss the prior suits was heard on September 22, 1972, and the Court took the matter under advisement and scheduled a subsequent hearing for September 26, 1972. On September 26th an amendment complaint was filed in this third suit adding as defendants Thomas F. Turley, Jr., Robert L. Taylor and David M. Pack. The amended complaint prayed for a temporary order, restraining the defendants Thomas F. Turley, Jr., and Robert L. Taylor from taking a seat on the Supreme Court of Tennessee until their respective claims to the office were adjudicated on the merits to a final judgment. After argument of counsel this Court was of the opinion that under Tennessee case law it was its duty to dismiss the first two suits on the Attorney General's motions.

State, ex rel., v. Agee, 105 Tenn. 588, 59 S.W.
[fol. 6] 340 (1900); *State, ex rel., v. Turnpike Company*,

112 Tenn. 615, 79 S.W. 798 (1903). Therefore this Court granted General Shriver's motion to dismiss A-1812 (Exhibit 13) and A-1812-A (Exhibit 21) and issued the temporary restraining order sought.

JURISDICTION AND VENUE

Given the above-stated facts, this Court is firmly of the opinion that a quo warranto action lies against both defendants, Turley and Taylor, under the authority of T.C.A. §23-2801. The Attorney General has, throughout this case, expressed doubt on this point because neither Turley nor Taylor was actually exercising the prerogatives or performing the duties of the office in question.

Section 23-2801(1) is not to be read so narrowly as would give rise to a quo warranto only when someone is actually performing the functions of a given office. This statement is consistent with Tennessee case law. In *State, ex rel., Bryant v. Maxwell*, 189 Tenn. 187, 224 S.W.2d 833 (1949), the Supreme Court noted that the complaint

[fol. 7] charged Maxwell with " ... unlawfully *attempting* to qualify as and hold and exercise the office of a Justice of the Peace of Bradley County ...."

187 Tenn. at 189. [Emphasis added.] Paragraph XIII of the original complaint in *Bryant* alleged the following:

> And your relator charges that defendant in pursuance of his fraudulent, irregular and illegal pretended election, ***has attempted to gain the office of Justice of the Peace and has been sworn in and attempted to qualify and now holds himself out as a Justice of the Peace*** for the City of Cleveland, Tennessee. [Emphasis added.]

In *Bryant* there was no question but that the *attempt* to qualify as, hold and exercise the office gave rise to a quo warranto action under Section 23-2801.

Such a holding is consonant with the clear legislative purpose underlying the enactment of Section 23-2801. The Supreme Court of Illinois in considering its quo warranto statute stated the underlying legislative purpose in the following terms:

> "But the motion is resisted solely on the ground the petition does not show the essential fact of possession and *user* of the office by defendant, which he is charged with having usurped.... The objection does not go to the merits of the controversy, and *no subtle reasoning ought to be indulged to defeat the demand of the people to know by what warrant defendant sets up any claim to the office as alleged.*" [Emphasis added.]
>
> *People, ex rel., Evans v. Callaghan*, 83 Ill. 128, 134 (1876).

[fol. 8] The "demand of the people" to know by what right any man claims title to a public office underlies Section 23-2801. This clear legislative purpose would be defeated were this Court to read the statute so narrowly as to exclude from its scope the two claims here in question; for both Turley and Taylor claim to possess lawful title to the office in question. Each has exerted every effort he deemed appropriate to secure the office. For example, defendant Taylor accepted the Secretary of State's Certificate of Election, took the oath of office, filed copies of the Certificate of Election and the oath of office with the Clerk of the Supreme Court, reported to the office of the Supreme Court in Memphis and Jackson, appeared in Nashville at the Supreme Court's session on September 6 ready to assume a seat on the Court, filed a quo warranto to keep Judge Cooper from temporarily occupying the vacant seat, and at all times publicly claimed that he is presently holding this office. While defendant

Turley has not been so active in attempting to take the seat, there can be no doubt that he claims rightful title to the office; he was issued a commission by the Governor, and he likewise appeared in Nashville at the Supreme Court's session on September 6, he has indicated that if his title to the office is vindicated in this action,
[fol. 9] he will resign his position as United States Attorney General and accept and perform the duties of the office in issue. These considerations are sufficient to sustain an action in quo warranto against both defendants Turley and Taylor under T.C.A. § 23-2801.

By holding this to be a quo warranto, the possibility is excluded that this is an election contest. Resolution of the competing claims here at issue does not require the Court to go behind the election returns. Thus, this is not an "election contest" under the case law of Tennessee. *Adcock v. Houk*, 122 Tenn. 269, 122 S.W. 979 (1909), *State, ex rel., Bryant v. Maxwell*, 189 Tenn. 187, 244 S.W.2d 833 (1949). Consequently the jurisdiction and venue requirements which operate in "election contests" are not applicable here. This is a quo warranto. The action brought in this Court meets the jurisdiction and venue requirements of quo warranto.

THE CLAIMS AGAINST DUNN AND CARR

The defendant, Winfield Dunn, is sued in his capacity as Governor of the State of Tennessee. The complaint, as amended, alleges that on August 19, 1972,
[fol. 10] defendant Dunn issued a commission purporting to appoint Thomas F. Turley, Jr., to the associate justiceship on the Supreme Court of Tennessee left vacant by the death of Mr. Justice Creson; that the appointment was made effective September 1, 1972, from

which date Turley would serve until September 1, 1974; that the commission was filed with the Clerk of the Supreme Court, Middle Section, on August 21st, 1972. The complaint further alleges that defendant Dunn failed to issue a writ of election to fill the vacancy on the Supreme Court at the regular biennial election of August 3, 1972. The complaint alleges that said acts constitute the unlawful exercise of a public office within the meaning of T.C.A. §23-2801(1).

Defendant Joe C. Carr is sued in his capacity as Secretary of State of the State of Tennessee. The complaint, as amended, alleges that defendant Carr, on August 18, 1972, issued to Robert L. Taylor a certificate which certified him as "duly elected Judge, Western Division, Supreme Court of Tennessee in the August 3, 1972, General Election."

The complaint alleges that no election was in fact held on August 3, 1972, for the office to which Taylor was certified as elected. In this respect, the complaint [fol. 11] alleges that defendant Carr unlawfully exercised a public office within the meaning of T.C.A. §23-2801(1).

On October 4, 1972, motions to dismiss were filed on behalf of Dunn and Carr. In its order of October 9, 1972, this Court denied both motions to dismiss, but granted leave to both defendants to incorporate the grounds of the motions in their respective answers, and granted leave to rely on those same grounds at the trial of the case. The Court is now prepared to dispose of the substance of those defenses asserted by Dunn and Carr.

The relevant portion of T.C.A. §23-2801, reads as follows:

"An action lies in the name of the state against the person or corporation offending, in the following cases:

(1) Whenever any person *unlawfully* holds or *exercises any public office* or franchise within this state, or any office in any corporation created by the laws of this state...." [Emphasis added.]

It is the contention of the plaintiff herein that defendants Dunn and Carr, by their performance of the acts alleged, were unlawfully exercising a public office within the meaning of Section 23-2801(1). This contention is not well founded.

[fol. 12] In analyzing plaintiff's position a clear distinction must be drawn between, (1) the issue of whether the *person* performing the duties and prerogatives of a given public office is the right person to do those acts, *i.e.* is he the person lawfully qualified to fill that office; and (2), the issue of whether in a particular instance a public official took the proper course of action, *i.e.* made a correct and lawful decision. The former question focuses on the person; the latter focuses on official acts.

Section 23-2801(1) T.C.A., is concerned with the former question: whether the person who is making the decisions and performing the duties of a particular office is the right person to take those actions, without regard to whether the action taken is itself in conformance with the law. The allegations of this complaint, however, go to the latter question: granting that Dunn and Carr were the proper persons to take any actions, did the actions themselves conform to law.

Thus, it is clear that the complaint fails to state a cause of action under Section 23-2801(1). It is not asserted that

[fol. 13] Dunn was an improper person to issue a commission. The complaint only asserts that Dunn erred in his judgment regarding the manner in which the appointment should be made. Similarly, it is not contended that Carr was the wrong person to issue a certificate of election, if indeed one was to be issued. The complaint is simply that Carr erred in issuing the certificate to Taylor under the circumstances.

Section 23-2801(1) T.C.A. is concerned with whether the right person is exercising a public office in question. It is not intended to prohibit properly serving public officers from making wrong judgments; neither is it intended to create a cause of action for the making of an erroneous judgment.

No cause of action is stated against either defendant under Section 23-2801(1) T.C.A.

As an alternative theory plaintiff asserts that this is also a proper declaratory judgment action under T.C.A. §23-1101, *et seq.*, and that Dunn and Carr are properly joined as defendants thereunder.

Because all of the issues necessary to resolve this suit to try title to office can be decided under jurisdiction conferred by Section 23-2801, T.C.A., it is un-
[fol. 14] necessary to consider this contention. Therefore, to the extent that plaintiff's suit is brought under Section 23-1101 *et seq.*, T.C.A., it will be dismissed.

The plaintiff's earlier contention that T.C.A. §23-2801(5) supports a cause of action against Dunn and Carr under the facts of this case is without merit. Additionally, the complaint fails to show the defendants Dunn and Carr to be usurping any public office or laying claim to the office in dispute.

This Court has jurisdiction ancillary to that conferred by Section 23-2801 T.C.A., to try title to office. That ancillary jurisdiction is adequate to declare the constitutionality of statutes, if necessary, and to review the legal sufficiency of the acts of Dunn and Carr complained of herein.

This Court is therefore of the opinion that the defendants Dunn and Carr are not properly joined. Their acts complained of can be reviewed without their presence as defendants. The grounds asserted for dismissal in their respective motions to dismiss, and later incorporated in their respective answers, are well taken. The suit is dismissed as to the defendants Dunn and Carr.

THE "MODIFIED MISSOURI PLAN" AS IT RELATES TO THE CLAIMS OF THE PARTIES

[fol. 15] The plaintiff herein asks this Court for a determination on the question of the constitutionality of T.C.A. § 17-701, *et seq.*, popularly known as the "Modified Missouri Plan." The Attorney General contends that such a determination is prerequisite to a resolution of the competing claims of Turley and Taylor. It is the position of this Court that to grant this request exceeds the scope of its judicial authority. Therefore, this Court expressly declines to rule on the constitutionally of §§ 17-701 thru 716 T.C.A., or any portion thereof.

The courts of this country have traditionally refused to address themselves to issues, the decision of which is unnecessary for the resolution of the controversy before the particular court. Courts will not issue advisory opinions.

This legal doctrine is advanced not only in the treatises and by the courts of other jurisdictions, but is also firmly

imbedded in the case law of Tennessee. *State, ex rel., Loser v. National Optical Stores Co.*, 189 Tenn. 433, 225 S.W.2d 263 (1949). As recently as May of this year the Tennessee Supreme Court reaffirmed this
[fol. 16] requirement of justiciability. Speaking in *State v. Murray*, 480 S.W.2d 355 (1972), Mr. Justice Chattin stated:

> "This Court will not pass on the constitutionality of a statute, or any part of one, unless it is absolutely necessary for the determination of the case and of the present rights of the parties to the litigation." 480 S.W.2d at 357.

Earlier the Court had stated:

> "A Court determines the constitutionality of a legislative enactment only when upon proper presentation it is necessary to a decision of a material issue under consideration." *Phillips v. West*, 187 Tenn. 57, 213 S.W.2d 3 (1948).

It is the opinion of this Court that the respective claims of both Turley and Taylor can be resolved without passing on the constitutionality of T.C.A. Sections 17-701, *et seq.* Therefore, under the facts of this case, this Court respectfully declines to address this issue.

THE CLAIM OF TURLEY TO THE OFFICE OF ASSOCIATE JUSTICE

Defendant Turley's claim to the office rests solely on the strength of the commission by which the
[fol. 17] Governor undertook to appoint him to Justice of the Supreme Court effective September 1, 1972. In assessing this claim attention must be first directed to

the Constitution and relevant statutes. Article VII, §5, Constitution of Tennessee provides as follows:

> "Elections for judicial and other civil officers shall be held on the first Thursday in August one thousand eight hundred and seventy, and forever thereafter on the first Thursday in August next preceding the expiration of their respective terms of service. The term of each officer so elected shall be computed from the first day of September next succeeding his election ... No appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term. Every officer shall hold his office until his successor is elected or appointed, and qualified. No special election shall be held to fill a vacancy in the office of Judge or District Attorney, but at the time herein fixed for the biennial election of civil officers; *and such vacancy shall be filled at the next Biennial election recurring more than thirty days after the vacancy occurs.* [Emphasis added.]

The above constitutional requirement is executed by the following statutes:

> "*Vacancies in office.* —Whenever a vacancy, either by death, resignation, or removal, shall occur in the office of a judge of the Supreme Court or Court of Appeals, circuit judge, or chancellor, or judge of a criminal court, or judge of a special court of equal dignity with circuit and chancery courts, the vacancy in such office shall be filled by the qualified voters of the whole state for supreme judges and judges of the Court
> [fol. 18] of Appeals, and of such judicial district for the other judges, at the next biennial election in August, occurring more than thirty (30) days after

such vacancy, and in the meantime the governor shall appoint a person learned in the law and constitutionally qualified to discharge the duties of said office until such election can be had...."

T.C.A. § 17-112

"*Writs for special elections*. —The Governor *shall* order the election by issuing proper writs of election, giving notice thereof...." [Emphasis added.]

T.C.A. § 17-113

These constitutional provisions and their statutory coordinates set forth in the clearest terms a sequence of events which is to be followed when an incumbent Justice of the Supreme Court vacates his office, by death, resignation, or removal. If that vacancy occurs more than thirty (30) days preceding the next biennial election in August, then the vacancy must be filled at that general election. Section 17-133, T.C.A., makes it a mandatory duty of the Governor to call an election to fill this vacancy. As Chief Justice Green said in *Hanover v. Boyd*, 173 Tenn. 426, 435:

"(t)here is no place for the exercise of the discretion of the Governor. His duty is provided by the law."

The person duly elected in the August general election takes office, other requirements being complied [fol. 19] with, on September 1 next following the general election and serves for the remainder of the unexpired term of the vacating Justice.

For the interim period beginning on the day the vacancy occurs thirty (30) days prior to the next general election, and the last day of August next following that election, and

for that period only, the Governor is empowered to appoint an interim Justice who serves until his successor is chosen in the regular biennial election. This power is constitutional in its origin; it has been modified in its operation by the provisions of T.C.A. § 17-701, *et seq.*

In summary, the constitutional and statutory provisions cited above operate, when a vacancy has occurred more than thirty (30) days prior to the next regular biennial election, to divide the remainder of the vacating Justice's term into two parts: (1) the period between the date the vacancy occurs thirty (30) days prior to the next general election and the last day of August next following that election; and (2), the period beginning September 1 next following the regular biennial election. Those same provisions set out in unmistakable terms that the power to fill the two parts of the remaining term is different: (1) the interim period may be filled by appointment [fol. 20] of the Governor; and (2), the period beginning September 1 next following the regular biennial election is to be filled by vote of the people at the preceding biennial election.

The scheme above described is not changed by the addition of Chapter 7 of Title 17 of the Code, which creates the Appellate Court Nominating Commission and prescribes its manner of operation.

In this case the Governor chose not to exercise his constitutional power to appoint for the interim period between June 19 and August 31, 1972. Instead he attempted to fill the office by appointment effective September 1, 1972. This Court has no doubt that the Governor has no such power and that the attempt to exercise such power is utterly void.

To assert that Turley's appointment is valid, Turley must contend that the Governor may ignore the mandatory commands of the Constitution and the statutes, thereby rendering the office vacant, and then may use his appointing power to fill a vacancy which was created by his own improper course of action. The statement of the contention is its own refutation.

[fol. 21] The Governor's appointing power is limited to filling a vacancy from the date it occurs to the next regular biennial election occurring more than thirty (30) days after the vacancy occurred. In this case the Governor elected not to use the powers he had. Instead he attempted the exercise of a power which he does not possess. That attempt is void. The commission issued Turley is likewise void and of no effect. It is therefore the opinion of this Court that Turley's claim to the office must fail.

THE CLAIM OF TAYLOR TO THE OFFICE OF ASSOCIATE JUSTICE

Briefly stated, Taylor's claim to the office depends upon the validity of a write-in campaign which he sponsored, and which he contends resulted in an "election" being held as required by the Constitution and statutes; and in this election he was duly elected Associate Justice. For reasons hereinafter discussed, this Court is of the opinion that no valid election was held for the associate justiceship on August 3, 1972. Taylor's claim to the office must therefore fail.

Taylor announced as a write-in candidate for the associate justiceship on the afternoon of July 31,
[fol. 22] 1972, scarcely three days prior to the election.

Immediately upon his announcement, various public officials countered with public statements that Taylor was ineligible for the Court, that Taylor was not qualified, and that write-in votes would have no effect.

On August 3, 1972, 4,030 persons cast votes for the office in question. This compares to more than 668,000 persons who voted in other statewide elections that day.

The facts set out above give rise to a strong inference that no actual notice of this election was conveyed to a vast majority of the citizens who voted on August 3. This is the most reasonable explanation for the fact that in forty-nine of Tennessee's ninety-five counties—more than half—not a single vote was cast for the office of Associate Justice. This group of forty-nine includes Hamilton County, the state's fourth largest population center. In only six of the ninety-five counties were more than 100 votes cast. Sixth-tenths of one percent of the total number of voters in the August 3 election participated in the attempted write-in election. To hold Taylor's write-in campaign resulted in a valid election, would effectively disfranchise the vast majority of the citizens [fol. 23] of this state who cast votes in statewide elections on August 3, this through no fault of their own.

The fact that only 4,030 persons voted in the attempted write-in election does not of itself invalidate the election. As an abstract fact, the number of votes cast in an election is irrelevant in determining its validity. However, in this case the comparative vote counts are evidentiary facts which give rise to a strong inference that there was no actual notice to the electorate of this election.

Taylor has earnestly contended that the failure of the Governor to perform his statutory duty to call the election in question should not be permitted to thwart the will of the people. With this proposition this Court is in complete agreement. *Hanover v. Boyd*, 173 Tenn. 426, 121 S.W.2d 120, (1938), is strong authority for this position. And were this Court convinced that Taylor's write-in effort had afforded the electorate adequate opportunity to express its collective will, this Court would not hesitate to declare that a valid election had been held, just as did the Court in *Hanover*, despite the Governor's failure to meet the technical notice requirements. But [fol. 24] that point is not reached in the case at bar because this Court has concluded as a threshold matter that *actual* notice was not given the electorate, and hence no complete expression of the public will occurred. It is this fact which distinguishes the present case from *Hanover*.

Our Supreme Court was faced with a situation closely paralleling this present case in *State, ex rel., Bryant v. Maxwell, supra*. As here, the Constitution requires the office there in issue to be filled at the regular biennial general election. However, the local election commission charged with conducting that election stated publicly that the election for that office would not be held on the required date, but at a later date in October. Further, the commission refused to accept the petition of one Haven to have his name placed on the general election ballot as a candidate for that office. The only ballot made available by the commission made no provision for an election to fill the office in question. This was in accord with public statements by the commission that the election for that office would not be held on the required date. At the

general election six voters wrote in the name of one Maxwell for the office. On the strength of those six votes, out of several hundred cast, the election commission issued a certificate of election to Maxwell.

[fol. 25] Quo warranto was instituted against Maxwell. The Supreme Court held that, under these circumstances, the electorate had no notice that the election was held; hence, there was no valid election. The Court stated that "[t]o decide otherwise would amount to a disfranchisement as to this office of practically all the voters in the large town of Cleveland. These voters were without fault in the matter." 189 Tenn. at 193. These statements apply with equal force to the claim asserted by Taylor.

Contrary to Taylor's contention, the Court did not rest its decision in ***Bryant*** on the alleged fraudulent conduct of the commission. The Court stated, "whether this [allegation of conspiracy] is or [is] not true, the same result will follow here a legally ineffective act, whether done with fraudulent intent or by honest mistake." 189 Tenn. at 192.

In his venerated work Cooley notes " ... that cannot be called an election or the expression of popular sentiment where a part only of the electors have been allowed to be heard, and the others, without being guilty of fraud or negligence, have been excluded." Thomas M. Cooley, ***Constitutional Limitations***, (8th ed. 1927) at [fol. 26] 1395. Under the circumstances noted, this Court is forced to conclude that the write-in effort did not result in a valid election. Therefore, Taylor's claim must fail.

CONCLUSION

Because this Court has found that neither Turley nor Taylor has a valid claim to the office of Associate Justice, there is presently no one duly qualified to fill that office. Thus, there is presently, and has been since September 1, 1972, a "vacancy" on the Supreme Court, as that term is defined by the Constitution and the statutes. This vacancy results from the failure of that office to be filled by vote of the people in the August 3, 1972, biennial general election as required by the Constitution and the statutes.

Decree accordingly.

/s/ Frank F. Drowota, III
Frank F. Drowota, III, Chancellor

This November 10, 1972.

Order

Decree Entered November 10, 1972 in M. B. 86, page 41

IN THE CHANCERY COURT, PART TWO, AT NASHVILLE

STATE OF TENNESSEE, EX REL

VS. NO. A-1812-B

WINFIELD DUNN, ET AL

ORDER

Stipulations and Admissions of Fact, signed by all counsel of record, were filed in this cause on October 28, 1972. In these stipulations and admissions the parties reserved the right to object to any stipulation or admission because of relevancy or materiality of the material contained in the stipulation. The defendants Turley, Taylor and Pack have filed objections to certain items in the Stipulations and Admissions of Fact.

This Court indicated in its Memorandum Opinion, filed November 10, 1972, which is incorporated herein by reference, what facts it considered relevant. This Court is of the opinion that the following items and exhibits are irrelevant: Items 33, 42, 51 and Exhibits 30, 32.

Inasmuch as defendant Pack objects to Item 48 as being factually incorrect and moves to correct the stipulation, this Court is of the opinion that said motion is not well taken and should therefore be denied.

ALL OF WHICH IS ACCORDINGLY SO ORDERED, ADJUDGED AND DECREED BY THE COURT.

/s/ Frank F. Drowota III, Chancellor
FRANK F. DROWOTA III, CHANCELLOR

This November 10, 1972

Decree Entered November 10, 1972 in M. B. 86, page 42

IN THE CHANCERY COURT OF DAVIDSON COUNTY PART II AT NASHVILLE

STATE OF TENNESSEE by THOMAS H. SHRIVER, District Attorney General, on Relation of THOMAS A. HIGGINS

VS.

WINFIELD DUNN, et al.

Rule No. A-1812-B

DECREE

This case came on to be heard on October 28, 1972, before the Honorable Frank F. Drowota, III, Chancellor, on the pleadings, stipulations and admissions of fact, argument of counsel and the entire record. At the conclusion of the hearing on October 28, 1972, the case was taken under advisement and today, November 10, 1972, the Court has filed a memorandum opinion.

Therefore, based upon all of the foregoing it is, accordingly, ORDERED, ADJUDGED and DECREED:

1. That the Court's memorandum opinion, filed November 10, 1972, be made a part of the technical record in this case but need not be copied on the minutes of the Court.

2. That this case was brought properly pursuant to the provisions of T.C.A. 23-2801, *et seq.* and this action meets the jurisdictional and venue requirements of the provisions of T.C.A. 23-2801, *et seq.*

3. That this case be dismissed to the extent that it was brought pursuant to the provisions of T.C.A. 23-1101, *et seq.*.

4. That this case be dismissed as to the defendants, Winfield Dunn, Joe C. Carr and David M. Pack.

5. That the Court expressly declines to rule on the constitutionality of T.C.A. 17-701 through T.C.A. 17-716, or any portion thereof.

6. That the claim of the defendant, Thomas F. Turley, Jr., to the office of Associate Justice of the Supreme Court of Tennessee be deemed a nullity and that the commission issued to the defendant, Turley, be and the same hereby is declared null and void and of no force and effect.

7. That the claim of the defendant, Robert L. Taylor, to the office of Associate Justice of the Supreme Court of Tennessee be deemed a nullity and that the certificate of election issued to the defendant, Taylor, be and the same hereby is declared null and void and of no force and effect.

8. That one-half (1/2) of the Court costs in this case be taxed against the plaintiff, and one-fourth (1/4) of the Court costs be taxed against each of the defendants, Turley and Taylor, and for all of the foregoing execution may issue if necessary.

To the foregoing action of the Court the plaintiff and the defendants, Turley and Taylor, respectfully except to the extent that their respective interests are aggrieved and pray appeals to the next term of the Supreme Court of Tennessee, sitting at Nashville, which appeals are granted upon condition that the appeals are perfected within the time and in the manner provided by law.

ENTER this November 10, 1972.

B. 37

Order

/s/ Frank F. Drowota, III,
Chancellor
FRANK F. DROWOTA, III,
CHANCELLOR

SUPREME COURT, NASHVILLE

STATE OF TENNESSEE BY THOMAS H. SHRIVER, DISTRICT ATTORNEY GENERAL ON RELATION OF THOMAS A. HIGGINS

vs.

WINFIELD DUNN, ET AL

Davidson Equity

FILED
DEC 4 1972
RAMSEY LEATHERS
Clerk
SUPREME COURT

ORDER

This cause came on to be heard upon motion to expedite the hearing in this matter; and, upon consideration thereof, the Court is of the opinion that said motion should be granted.

It is, therefore, Ordered that the motion to expedite is granted, and the cause is transferred to Knoxville for oral arguments on Thursday, January 11, 1973, at 9:00 A.M., E.S.T.

This 4th day of December, 1972.

/s/ Ross W. Dyer
CHIEF JUSTICE

/s/ Chester C. Chattin
JUSTICE

/s/ Allison B. Humphreys
JUSTICE

/s/ George F. McCanless
JUSTICE

/s/ John W. Wilson
SPECIAL JUSTICE

In the cause of State of Tennessee by Thomas H. Shriver, District Attorney General, on relation of Thomas A. Higgins, v. Windfield Dunn, et al, Davidson Equity, the Court, pursuant to T.C.A. 16-331, hereby appoints the Honorable Luke McAmis, formerly Presiding Judge of the Court of Appeals, Retired, to sit in the place and stead of Chief Justice Ross W. Dyer, who has recused himself in this cause.

/s/ Chester C. Chattin

/s/ Allison B. Humphreys

/s/ George F. McCanless

/s/ John W. Wilson

FILED
JAN 11 1973
JOHN A. PARKER, Clerk
By .....

B. 40

Opinion

For Publication

STATE OF TENNESSEE by THOMAS H. SHRIVER, DISTRICT ATTORNEY GENERAL, on Relation of THOMAS A. HIGGINS

V.

WINFIELD DUNN, JOE C. CARR, THOMAS F. TURLEY, JR., ROBERT L. TAYLOR and DAVID M. PACK

FILED
MAR 19 1973
RAMSEY LEATHERS
Clerk
SUPREME COURT

DAVIDSON EQUITY

Hon. Frank F. Drowot
Chancellor.

For Appellant:

Thomas H. Shriver,
District Attorney General
and Thomas A. Higgins,
Nashville, Tennessee

For Appellee, Pack:

Robert H. Roberts,
Assistant District Attorney Ge

For Appellee, Turley:

Ward DeWitt, Jr.
Nashville, Tennessee, and
Hewitt P. Tomlin
Jackson, Tennessee

For Appellee, Taylor:

Cecil D. Branstetter
Nashville, Tennessee

OPINION

This suit has two aspects: first, it is an action in the nature of *quo warranto*, brought under the authority of

Section 23-2801, et seq., T.C.A., in the name of the State of Tennessee by Thomas H. Shriver, District Attorney General, on relation of Thomas A. Higgins, a practicing lawyer and citizen of Davidson County, to have judicially determined the conflicting claims of two persons to the office of Judge of the Supreme Court of
[fol. 2] Tennessee left vacant by the death of Judge Larry Creson; and, second, it seeks to have declared invalid and unconstitutional Sections 17-701 to 17-716, inclusive, T.C.A., enacted originally as Chapter 198 of the Public Acts of 1971, the statute that provides for the nomination, appointment, and election of judges of the appellate courts of the State.

The Chancellor decreed that neither of the two claimants, Thomas F. Turley, Jr., and Robert L. Taylor, is entitled to the office; but because it was his opinion that it had been unnecessary in reaching that decision to pass upon the validity of Section 17-701, et seq., T.C.A., he declined to make an adjudication of the validity of the statute.

Thomas F. Turley, Jr., and Robert L. Taylor have appealed from the Chancellor's decree and the District Attorney General and the relator have appealed from his action in declining to rule on the validity of the challenged statute.

The facts were stipulated and the appeals are to the Supreme Court.

On June 19, 1972, Judge Larry Creson, a member of this Court, died at his home in Memphis. The following day, June 20, 1972, Governor Winfield Dunn
[fol. 3] officially gave notice of the death to the Chairman of the Appellate Court Nominating Commis-

sion, established under the provisions of Section 17-701, et seq., T.C.A., (Chapter 198 of the Public Acts of 1971), and requested him to initiate proceedings to nominate three persons eligible for appointment to fill the vacancy.

On July 18, 1972, the Commission selected and submitted to the Governor the names of three persons from the list of those who had been considered for nomination. Those whose names the Commission submitted were Charles W. Miles, III, Mark Anthony Walker, Jr., and Thomas F. Turley, Jr. On July 21, 1972, the Governor announced that he had appointed Mr. Turley to fill the vacancy, the appointment to be effective September 1, 1972.

The Governor did not issue writs of election to the election commissioners of the State, in accordance with Section 17-113, T.C.A., ordering an election to fill the vacancy and there was no publication calling such an election.

On July 31, 1972, Robert L. Taylor publically announced that he was a write-in candidate to fill the vacancy in the election to be held August 3, 1972. The announcement received wide publicity in the newspapers and [fol. 4] on the radio and television stations of the State. The news media also gave publicity to a statement by the Governor that Mr. Taylor was not eligible for the office.

In the election of August 3, 1972, throughout the State more than 668,000 persons voted. Of these, 4,030 cast write-in ballots for Judge of the Supreme Court. Votes were cast for the office in 46 counties; Robert L. Taylor received 3,301 votes, Thomas F. Turley 555 votes, and others 174 votes.

After the election of August 3, 1972, Mr. Taylor announced that he had been elected and would fill the office.

On August 18, 1972, the Secretary of State issued Mr. Taylor a certificate of election that contained the recitation that he had "been duly elected Judge, Western Division, Supreme Court of Tennessee in the August 3, 1972, General Election." On August 23, 1972, Mr. Taylor took the oath as a Judge of the Supreme Court before one of the Chancellors of the State.

On August 19, 1972, the Governor issued Thomas F. Turley, Jr., a commission appointing him "Justice of the Supreme Court of the State of Tennessee, effective September 1, 1972, to serve until September 1, 1974, and until he shall have been elected and retained in office pursuant to Section 17-715, Tennessee Code Annotated."

[fol. 5]

The complaint in this suit, filed September 21, 1972, named as defendants Governor Winfield Dunn and Secretary of State Joe C. Carr. An amended complaint, filed September 26, 1972, added as defendants David M. Pack, Attorney General and Reporter, Thomas F. Turley, Jr., and Robert L. Taylor.

At the hearing the Chancellor dismissed the suit as to defendants Dunn, Carr, and Pack, and none of the appellants has assigned as error the Chancellor's action in dismissing those defendants. Attorney General Pack, although dismissed as a defendant, participates in the appeal because of the declaratory judgment aspect of the suit.

At the hearing the Chancellor was of opinion and held that an action *quo warranto* lies against the defendants, Thomas F. Turley and Robert L. Taylor. In his memorandum opinion he wrote:

"Section 23-2801(1) is not to be read so narrowly as would give rise to a quo warranto only when someone is actually performing the functions of a given office. This statement is consistent with Tennessee case law. In *State, ex rel., Bryant v. Maxwell*, 189 Tenn. 187, 224 S.W.2d 833 (1949), the Supreme Court [fol. 6] noted that the complaint charged Maxwell with '... unlawfully *attempting* to qualify as and hold and exercise the office of a Justice of the Peace of Bradley County....' 187 Tenn. at 189. [Emphasis added.] Paragraph XIII of the original complaint in Bryant alleged the following:

> " 'And your relator charges that defendant in pursuant of his fraudulent, irregular and illegal pretended election, has attempted to gain the office of Justice of the Peace and has been sworn in and attempted to qualify and now holds himself out as a Justice of the Peace for the City of Cleveland, Tennessee.' [Emphasis added.]

In *Bryant* there was no question but that the *attemp* to qualify as, hold and exercise the office gave rise to a quo warranto action under Section 23-2801.

"Such a holding is consonant with the clear legislative purpose underlying the enactment of Section 23-2801. The Supreme Court of Illinois in considering its quo warranto statute stated the underlying legislative purpose in the following terms:

" 'But the motion is resisted solely on the ground the petition does not show the essential fact of possession and *user* of the office by defendant, which he is charged with having usurped... The objection does not go to the merits of the controversy, and *no subtle reasoning*

ought to be indulged to defeat the demand of the people to know by what warrant defendant sets up any claim to the office as alleged.' [Emphasis added.]

People, ex rel., Evans v. Callaghan, 83 Ill. 128, 134 (1876).

"The 'demand of the people' to know by what right a man claims title to a public office underlies Section 23-2801. This clear legislative purpose would be defeated were this Court to read the statute so narrowly as to exclude from its scope the two claims here in question; for both Turley and Taylor claim to possess lawful title to the office in question. Each has exerted every effort he deemed appropriate to secure the office. For example, defendant Taylor accepted the Secretary of State's Certificate of Election, took the oath
[fol. 7] of office, filed copies of the Certificate of Election and the oath of office with the Clerk of the Supreme Court, reported to the office of the Supreme Court in Memphis and Jackson, appeared in Nashville at the Supreme Court's session on September 6 ready to assume a seat on the Court, filed a quo warranto to keep Judge Cooper from temporarily occupying the vacant seat, and at all times publicly claimed that he is presently holding this office. While defendant Turley has not been so active in attempting to take the seat, there can be no doubt that he claims rightful title to the office; he was issued a commission by the Governor, and he likewise appeared in Nashville at the Supreme Court's session on September 6, he has indicated that if his title to the office is vindicated in this action, he will resign his position as United States Attorney General and accept and perform the duties of the office in issue. These considerations are sufficient to sustain an action

in quo warranto against both defendants Turley and Taylor under T.C.A. §23-2801.

"By holding this to be a quo warranto, the possibility is excluded that this is an election contest. Resolution of the competing claims here at issue does not require the Court to go behind the election returns. Thus, this is not an 'election contest' under the case law of Tennessee. ***Adcock v. Houk***, 122 Tenn. 269, 122 S.W. 979 (1909), ***State, ex rel., Bryant v. Maxwell***, 189 Tenn. 187, 244 S.W.2d 833 (1949). Consequently the jurisdiction and venue requirements which operated in 'election contests' are not applicable here. This is a quo warranto. The action brought in this Court meets the jurisdiction and venue requirements of quo warranto."

We agree with both the reasoning and the conclusion of the Chancellor that this is an action ***quo warranto*** under Section 23-2801, T.C.A. None of the appellants assigned as error the action of the Chancellor so holding, and the subject is not an issue in this appeal.

Opinion

[fol. 8] We first consider the contention of the appellant, Robert L. Taylor, that he is a lawfully elected and qualified Judge of the Supreme Court of Tennessee. If that contention is valid its validity must depend on the conclusion that this appellant was elected to the office by the write-in vote on August 3, 1972.

Mr. Taylor has assigned four errors in summary as follows: (1) that the Chancellor should have held that the appellant was lawfully elected, (2) that he erred in holding that the recognition of write-in votes "would effectively disfranchise the vast majority of the citizens who cast votes in the state wide election on August 3, ...", (3) that he erroneously failed to consider the Supreme Court's past statements that lack of official notice of an election whose time and place are fixed by the Constitution will not vitiate an election, and that those electors who exercise their right to vote cannot be denied the right to have their votes counted by the fact that other electors chose not to vote, and (4) that the Chancellor, by his decision, deprived the appellant of his office and property without due process of law.

The first assignment is directed at the conclusion of the Chancellor, the second and third are offered in support of the first, and the validity of the fourth must depend on the correctness of the Chancellor's conclusion which the first attacks. It results that the first of these assignments is conclusive of Mr. Taylor's contention.

An election of a Judge or of a District Attorney General to fill a vacancy can be held at no other time than at a biennial election. The election to fill such a vacancy is a special election though it must be held at the same time as an August general election. This appears from

[fol. 9] the language of the Constitution, Article 7, Section 5. *Hanover v. Boyd*, 173 Tenn. 426, 121 S.W.2d 120 [1938].

Article 7, Section 5 of the Constitution of Tennessee provides:

> "*Civil officers — Election — Vacancies.* — Elections for Judicial and other civil officers shall be held on the first Thursday in August, one thousand eight hundred and seventy, and forever thereafter on the first Thursday in August next preceding the expiration of their respective terms of service. The term of each officer so elected shall be computed from the first day of September next succeeding his election. The term of office of the Governor and of other executive officers shall be computed from the fifteenth of January next after the election of the Governor. No appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term. Every officer shall hold his office until his successor is elected or appointed, and qualified. No special election shall be held to fill a vacancy in the office of Judge or District Attorney, but at the time herein fixed for the biennial election of civil officers; and such vacancy shall be filled at the next Biennial election recurring more than thirty days after the vacancy occurs.

The General Assembly implemented this Section of the Constitution by the enactment of Section 17-112, T.C.A., as follows:

> "*Vacancies in office.* — Whenever a vacancy, either by death, resignation, or removal, shall occur in the office of a judge of the Supreme Court or Court of Appeals, circuit judge, or chancellor, or judge of a

[fol. 10] criminal court, or judge of a special court of equal dignity with circuit and chancery courts, the vacancy in such office shall be filled by the qualified voters of the whole state for supreme judges and judges of the Court of Appeals, and of such judicial district for the other judges, at the next biennial election in August, occurring more than thirty (30) days after such vacancy, and in the meantime the governor shall appoint a person learned in the law and constitutionally qualified to discharge the duties of said office until such election can be had. If a vacancy shall occur in the office of a supreme judge or judge of the Court of Appeals, it shall be filled from the grand division of the state in which the vacancy occurs."

These provisions of the Constitution and of the Code require that the vacancy which occurred more than thirty days before the election of August 3, 1972, be filled at that election.

Section 17-113, T.C.A., required the Governor in the circumstances existing to issue a writ of election to all commissioners of election of the State for an election to fill the vacancy. That Section is:

"*Writs for special elections*.—The governor shall order the election by issuing proper writs of election, giving notice thereof.

"In the case of supreme judge or appeals judge, the Writs shall issue to all county commissioners of elections in the state, and the notice shall be for at least thirty (30) days, by publication in a newspaper in each grand division of the state. In the case of a
[fol. 11] circuit judge, chancellor, criminal judge or judge of a special court of equal dignity with

circuit and chancery courts, the writs shall issue to the county election commissioners throughout the circuit, chancery division or special district for which the election is to be held, and the notice shall be for at least thirty (30) days by publication in one or more newspapers of the said circuit, chancery division or special district. Whenever the vacancy occurs in sufficient time prior to the election date, notice shall be given and candidates will qualify as in the case of other elections for such office, however, where the vacancy occurs too late for such notice and period of qualification for candidates but more than thirty (30) days before the election, notice will be given at least thirty (30) days as above provided and candidates shall have until twenty-five (25) days before such election in which to qualify as provided by law either as a party nominee or as an independent candidate."

The appellant, Taylor, who relies on election to claim the vacancy, must assume the validity of the above quoted statutes and that they were not repealed by the enactment of Chapter 198 of the Public Acts of 1971, carried into the Code as Sections 17-701 to 17-716, inclusive. The effect of the 1971 enactment, if valid, repealed the provisions for the kind of an election as that under which the appellant, Taylor, asserts title to the office he claims.

The office that Judge Creson held became vacant with his death forty-five days before the biennial election. The Constitution required that the vacancy be filled at that election and to execute the requirement of the Constitution, the Legislature enacted 17-113, T.C.A. The Governor did not order the election as required by that Section.

[fol. 12] In *Barry v. Lauck*, 45 Tenn. 588 [1868], a case in which the Court held a special election void for want of notice, the Court said:

"But a mere voluntary omission to vote, on the part of those entitled, where a full and fair opportunity has been offered, will not alone avoid the election. Those who did exercise their electoral rights cannot be deprived of the fair results of the election, by the mere failure of others to vote. The question is not whether all the legal voters in the district actually expressed their will at the polls, but whether they had the opportunity which the law requires, to do so.

"This being a special election, notice to the electors was essential to its validity; and for want of this notice, the election, so far as it concerns Macon County, was void.

* * *

"The safety of the State depends upon the preservation of the integrity of the elective franchise and the purity of the elections; and these can only be preserved by requiring the officers charged with duties in regard thereto, to comply with all the essential requisites of the laws placed to guard the franchise against abuse, fraud or violence.

"In the present instance, the number of registered voters in Macon County who did not vote, was more than sufficient, if they had all voted one way, to have changed the result as declared. We have no means of knowing how their ballots would have been cast if they had voted, and must presume their failure to vote was the result of want of notice; and therefore we have no

assurance that the result of this election is an expression of the will of the people of that county, or of the judicial district."

Hanover v. Boyd, *supra*, involved a special election made necessary by the death of a District Attorney General thirty-one days before an August election. In [fol. 13] that case the Governor declined to order a special election and to issue writs therefore and undertook to fill the vacancy by appointment. The Chancery Court thereupon issued a mandatory injunction that required the election commissioners to call and to hold a special election to fill the unexpired term. The commissioners advertised and held the election.

The Court upheld the validity of the election and called attention to the fact that the vote cast in the election for District Attorney General was higher than that in any other office subject to election on that day except for the candidates for sheriff and observed that "there can be no question but that the people had adequate notice of the election and that there was a full expression therein by the people." The Court continued:

> "The vacancy was a matter of public knowledge. The election machinery was set up. It can make little difference who started the machinery so long as it functioned properly on a proper occasion."

In the case we are considering no one claiming to act by authority called or advertised an election; the appellant, Taylor, began a campaign for write-in votes just three days before the election, no votes at all were cast in 49 of the State's 95 counties, and only 4,030 of the more than 668,000 persons who voted in other statewide elections undertook to vote for a Supreme Court Judge.

[fol. 14] We hold that there was no election for Judge of the Supreme Court on August 3, 1972. We therefore overrule the appellant Taylor's assignments of error.

The issue now for our consideration is twofold:

(1) Whether or not Sections 17-701 to 17-716, T.C.A., the statutory sections providing for the non-partisan election of judges, are in conflict with Article 6, Section 3 of the Tennessee Constitution and therefore unconstitutional; and

(2) A determination of the rights of the parties under the statute if it is found to be constitutional.

Historically, constitutions have been regarded as providing a permanent framework of government. Customarily, they do not provide the details for exercising governmental power. For obvious reasons they are not intended to establish all the law which, from time to time, may be necessary to meet changing conditions, but only to mark the broad outlines of power.

Conflicting provisions of a constitution should be harmonized, if possible, in passing on the intent of the framers. If there should be doubt as to the meaning of language in the constitution or a seeming conflict in its provisions, "it is the duty of the court to harmonize such portions and favor the construction which will render every word operative, rather than one which will make some words idle and meaningless." ***Shelby County v. Hale***, 200 Tenn. 503, 292 S.W.2d 745 [1956].

[fol. 15] Article 6 in Section 3 and 4 provides that the Judges of the Supreme Court, the Circuit Court, the Chancery Court and other inferior courts shall be elected by the qualified voters, and that their terms of service shall be for eight years. The schedule to the Constitution of 1870 provides that the officers elected at the general election that year shall hold their offices for the terms provided in the constitution, so that the term that was vacated by the death of Judge Creson, as well as the term of every judge now in office began September 1, 1966, and will expire August 31, 1974.

Article 7, Section 4 is in the following words:

> "The election of all officers, and the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct."

Article 7, Section 5 provides for the general elections to be held on the first Thursday in August preceding the expiration of the terms of judges and other civil officers. It provides also that "No special election shall be held to fill a vacancy in the office of Judge or District Attorney, but at the time herein fixed for the biennial election of civil officers; and such vacancy shall be filled at the next biennial election recurring more than thirty days after the vacancy occurs."

[fol. 16] This constitutional requirement that members of the Supreme Court shall be elected by the qualified voters of the State is not self-executing. The holding of an election envisions much more than fixing a date when it is to be held and providing that only qualified voters shall participate. Provisions must be made by law for nominating and qualifying of candidates, certification

of results and the like. *State ex rel. v. Sup. Ct. of King County*, (Washington Sup. Ct.) 250 P. 66. Such executory details can be provided either in the Constitution itself or left to the Legislature. They are entirely absent from Article 6, Section 3.

In passing Chapter 128, Section 1, Acts of 1871, the Legislature at that early date conceived Article 7, Section 4 as needing legislative action. That Act, the origin of the appointing power now expressed in Sections 17-712 and 17-713, T.C.A., gave the Governor power to appoint in case of vacancies, circumscribed, consistent with Article 7, Section 5, by the provision that his appointee could never hold beyond the next general election. This Act did no violence to Article 6, Section 3. It merely supplemented it by providing for a temporary appointment to fill a vacancy until the next general election. Thus, the Legislature as authorized by Article 7, Section 4, exercised the authority vested in it to make provision for "the filling of all vacancies not otherwise directed or provided for by the Constitution."

[fol. 17] Even where the constitutional provision is held to be self-executing the rule is:

> "It is to be observed that even in the case of a constitutional provision which is self-executing the legislature may enact legislation to facilitate the exercise of the power directly granted by the constitution; legislation may be enacted to facilitate the operation of such a provision, prescribe a practice to be used for its enforcement, provide a convenient remedy for the protection of the rights secured or the determination thereof, or place reasonable safeguards around the exercise of the right. Stated differently, the rule is that a self-

executing provision of the constitution does not necessarily exhaust legislative power on the subject, but any legislation must be in harmony with the constitution and further the exercise of constitutional right and make it more available." 16 Am. Jur. 2d, Sec. 95, p. 280.

Aside from the interplay of Article 7, Section 4, there is no direct conflict between Article 6, Section 3 and the Act of 1971. The election under the Act is still to be made at the regular election every eight years by the qualified voters of the State at the next general election. Specific provision is made for the election of the Governor's appointee at the next general election as provided by the Constitution. Article 6, Section 3, makes no provision for notice, nomination and qualification of candidates even where the vacancy occurs shortly before the next general election. The 1971 Act, of course, makes other provisions controlling the election of members of the appellate courts, the most notable and far-reaching of which are that the incumbent shall be required to run on his record and not against an opponent and that the Governor shall appoint from a list of three chosen by the Commission created by the Act.

[fol. 18] The purpose of the statute as expressed in its preamble is "to assist the governor in finding and appointing the best qualified persons available for service on the appellate courts of Tennessee and to assist the electorate of Tennessee to elect the best qualified persons to said courts; to insulate the justices and judges of said courts from political influence and pressure; to improve the administration of justice; to enhance the prestige of and respect for the appellate courts by eliminating the necessity of political activities by appellate justices and judges; and to make the appellate courts of Tennessee 'nonpolitical.'"

All of these provisions of the Act, it seems to us, derive from the general powers of the Legislature and, with particular reference to the power to fill vacancies in public office, from the express provisions of Article 7, Section 4 and, since none of them is either directly or by necessary implication contrary to the Constitution, the Act is constitutional and valid.

The Constitution, by Article 6, Section 3 and 4, requires that the Judges of the Supreme Court and of the inferior courts be elected by the qualified voters. In case of Supreme Court Judges they shall be elected by qualified voters of the State; in case of Judges of the Circuit and Chancery Courts and other inferior courts they [fol. 19] "shall be elected by the qualified voters of the district or circuit to which they are to be assigned."

The attack on the statute providing a non-partisan method of filling vacancies in our appellate courts (Chapter 198 of the Public Acts of 1971, now Sections 17-701 to 17-716, inclusive, T.C.A.) is based entirely on the insistence that the voting provided for in Sections 17-714 and 17-715 is not an election within the requirements of Article 6, Section 3, and Article 7, Section 5, of our Constitution.

The Constitution of Tennessee does not define the words, "elect", "election", or "elected", and we have not found nor have we been referred to any provision of the Constitution or of a statute or to any decision of one of our appellate courts defining these words.

There are three instances in which the Constitution provides for referenda and refers to them as elections:

Opinion

Art. 2, Sec. 29 provides that the credit of no County, City, or Town shall be given or loaned to or in aid of any person, association or corporation, except upon an *election* to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast in said *election*. This provision was adopted in 1870.

[fol. 20] Art. II, Sec. 3 includes a new provision with regard to amending the Constitution. The proposed amendment may be submitted to the qualified voters "at an *election*". This is one of the 1953 amendments.

Art. II, Sec. 9 provides for the ratification of private acts, one of the methods being by "approval in an *election* by a majority of those voting in said *election*," etc. This provision, as we know, originated in 1953.[1]

Footnote (1)

Elections

5-401 - 5-406	"election to remove county seat.
5-1101 - 5-1025	"election to authorize general obligation bonds.
5-1108 - 5-1109	"election" to authorize postwar public works bonds.
6-1519	"election" to authorize bonds for municipal electric plants.
6-1610	"election" to authorize municipal public works bonds.
6-1804	"election" to adopt city manager municipal charter.
6-1808 - 6-1809	"election" to surrender city manager charter.
6-2907	"election" to authorize industrial building bonds.
6-3006	"election" to adopt city manager-council charter.
6-3120 - 6-3121	recall "election" to recall councilmen under that charter.
6-3422	"election" to authorize certain municipal bonds.
65-705 - 65-709	"election" to authorize subscription for railroad stock.
67-3053	"election to authorize local sales tax.

It seems to us that if the Constitution itself denominates these methods of ratification as elections, it cannot be that Chapter 198 is unconstitutional because the elections therein provided for are limited to approval or disapproval. So are the elections provided in Sections of the Constitution referred to above. This is particularly the case, since Article 7, Section 4 reposes wide discretion in the Legislature with respect to elections and the filling of vacancies.

The District Attorney General and the relator, arguing that Chapter 198 of the Public Acts of 1971 is invalid, insist that the act is unconstitutional because the Appellate Court Nominating Commission therein provided for is to consist in part of three members of the General Assembly, elected by the General Assembly in joint session. (Sec. 2, Subsec. 3, Ch. 198, Pub. Acts of 1971; Sec. 17-702 (3), T.C.A.) They contend that this provision violates Article 2, Sec. 10 of the Tennessee Constitution which includes this prohibition:

[fol. 21] "No Senator or Representative shall, during the time for which he was elected, be eligible to any office or place of trust, the appointment to which is vested in the Executive or the General Assembly, except to the office of trustee of a literary institution."

In *State ex rel v. Bratton*, 148 Tenn. 174, 253 S.W.705 [1923], the Court adjudged that the election by the General Assembly of one of its members to a place on the State Election Commission was void. The Court said:

"An 'office' is a public charge or employment, the duties of which are prescribed by law, and he who performs the duties is an officer. *Day v. Sharp*, 128 Tenn., 346, 161 S.W., 994; 29 Cyc., 1361-1367.

"Positions which by article 2, section 10, of the constitution legislators are forbidden to hold, are such as impose duties prescribed by law, and not by contract. *Lewis v. Watkins*, 3 Lea, 183 *U.S. v. Maurice*, Fed. Cas. No. 15, 747, 3 Brock., 102."

Membership on the Appellate Court Nominating Commission is an office or place of trust within the meaning of Art. 2, Sec. 10 of the Constitution and the act of the General Assembly in electing three of its members to the Commission was void.

Since the act provides for the election of the legislative members of the Commission by a method that is unconstitutional then that part of the act requiring such election is unconstitutional and void; but Section 18 of the Act in expre terms provides that "if any of its sections, provisions, exceptions, sentences, clauses, phrases, or parts thereof be held unconstitutional void and/or invalid the remainder of the act shall continue in full force and effect,

[fol. 22] it being the legislative intent now hereby declared that this act would have been passed even if such unconstitutional, void and/or invalid provision had not been included therein."

The General Assembly having thus declared that if any section of the statute should be unconstitutional and void the remainder of it should continue in full force and effect, and it appearing to us that the portion remaining is comple in itself and capable of being executed wholly independent of Section 2, Subsection 3, we elide that section and adjud

that the statute was not rendered void because of the inclusion in it of that unconstitutional part. *Davidson County v. Elrod*, 191 Tenn. 109, 232 S.W. 2d 1 [1950].

We conclude that Chapter 198 of the Public Acts of 1971, codified as Sections 17-701 to 17-716, inclusive, T.C.A., with the exception of Subsection 3 of Section 2 of Chapter 198 [paragraph (3) of Section 17-702, T.C.A.] is not in conflict with the provisions of the Constitution of our State.

The appellant, Turley, has assigned the following errors in support of his contention that he is entitled to fill the vacancy.

(1) "The Chancellor erred in holding that the appointment of the defendant Thomas F. Turley, Jr. as Associate Justice of the Supreme Court and the commission issued relative thereto, was invalid."

(2) "The Court below erred in relying on and applying the provisions of T.C.A. Sec. 17-112 to the case at bar."

[fol. 23] (3) "The Chancellor erred in holding and ruling that the Governor's power of appointment to fill such a vacancy as the one before the Court was limited to the period between the date of the vacancy which occurs thirty days prior to the next general election and the last day of August next following that election."

(4) "It was error for the Court below to hold that the vacancy which the Governor attempted to fill was created by his own improper action."

The first assignment is general and challenges the conclusions the Chancellor reached with regard to this appellant's contentions. It is necessary that we first consider his other assignments.

Judge Creson's term of office would have expired August 31, 1974. His death occurred more than thirty days before the August election. This circumstance made it necessary that the vacancy be treated as having two parts, to be filled in two ways: (1) that part ending August 31, 1972, which the law directed to be filled by the Governor's appointment, and (2) that part beginning September 1, 1972, and ending August 31, 1974, which could be filled in no way other than by election. The enactment of Chapter 198 provided that the Governor should make his appointments to fill vacancies in the appellate courts only from lists of eligible persons submitted by the nominating commission. It did not undertake to grant to the Governor the authority to appoint for a term beginning the following September first when the vacancy occurs more than thirty days before the biennial August election. On the contrary, Section 17-712(2) provides:

> "The terms of all justices or judges appointed under this act shall expire August 31 following the next August biennial general election recurring more than thirty (30) days after the vacancy."

[fol. 24] The Governor made no appointment to fill that part of the term expiring August 31, 1972. He had the authority to make the appointment but did not exercise that authority. He appointed Mr. Turley to that part of the term beginning September 1, 1972, and by the express terms of Section 17-712(2) the period to which the Governor could appoint him already had expired before his attempted appointment became effective.

Mr. Turley assigns as error the Chancellor's holding that the Governor's power of appointment to fill the vacancy that existed was limited to that part of the term that expired on August 31, 1972, insisting that Section 17-112,

T.C.A., was repealed by Section 17 of Chapter 198 of the Public Acts of 1971, which provides:

> "All laws or parts of laws in conflict with the provisions of this act but not limited to portions of T.C.A. Section 8-1804, T.C.A. Section 17-112, and T.C.A. Section 2-102, are hereby repealed."

This assignment must be overruled, because there is no conflict between Chapter 198 and Section 17-112, T.C.A. Chapter 198 imposes conditions upon the Governor's power to appoint but does not affect the term for which he can appoint. Section 17-112, T.C.A., is repealed by Chapter 198 only to the extent that the terms of the two statutes may come into conflict.

We hold that the Governor was without power to appoint Mr. Turley to the term to which he appointed him. We therefore overrule his assignments of error and dismiss his appeal.

We overrule the assignments of error of the appellants. The decree will be pronounced in accordance with this opinion.

/s/ George F. McCanless
George F. McCanless, Justice

Mr. Chief Justice Dyer did not participate.

Mr. Justice Chattin, Mr. Special Justice McAmis, and Mr. Special Justice Wilson concur.

Mr. Justice Humphreys dissents.

[fol. 1]

STATE OF TENNESSEE BY THOMAS H. SHRIVER, DISTRICT ATTORNEY GENERAL, on Relation of THOMAS A. HIGGINS,

VS.

WINFIELD DUNN, JOE C. CARR, THOMAS F. TURLEY, JR., ROBERT L. TAYLOR and DAVID M. PACK

FILED
MAR 19 1973
RAMSEY LEATHERS
Clerk
SUPREME COURT

DAVIDSON
EQUITY

DISSENTING OPINION

I concur in much of the majority opinion. So, for the sake of brevity, I shall only mention that part from which I dissent.

I dissent from the redefinition of a constitutionally mandated election to permit only a referendum, so that no one can run in the August election except the appointee.

I dissent from the holding that no member of the General Assembly can serve on the nomination commission.

To the extent that the Modified Missouri Plan provides for the selection of possible appointees by a commission, it is constitutional under Article 7, §4 of the Constitution of Tennessee which provides, "The election of all officers and the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct."

[fol. 2] This part of the plan is a vast improvement over anything we have had, and since the entirely unnecessary exclusion of legislators from such a commission jeopardizes this arrangement, I must dissent.

Dissenting Opinion

My dissent from the holding that no member of the Legislature can serve on this commission is based on the simple proposition that, since the manner of filling vacancies is expressly entrusted entirely to the Legislature by Article 7, §4 of the Constitution, and so is legislative business, legislators can serve on the commission without violating Article 2, §11. Article 2, §11 provides that "a member of the Legislature shall not be eligible to any office or place of trust the appointment to which is vested in the Executive or the General Assembly." It would seem to be clear that Article 2, §11, applies to offices that are not legislative, and not to commissions that are designed to carry out legislative business. Since Article 7, §4 of the Constitution declares that power to fill vacancies on this Court is peculiarly the business of the Legislature, it is difficult to conceive how Article 2, §11, prohibits this. Suppose the Legislature had provided for a commission of nine of its own members to recommend appointees to the Governor, could it be said that this commission would be unconstitutionally constituted? Suppose it had passed a law whereby it filled vacancies, would this be unconstitutional? The answer must be in the negative. Then, how can it be that three members of the Legislature cannot serve on such a commission?

The majority opinion cites State ex rel. v. Bratten, 148 Tenn. 174, 252 S.W.2d 705 (1932), as authority for invalidating legislator membership on the commission. This case is not in point. It involved a legislator appointed to serve on the State Election Commis-
[fol. 3] sion. There is nothing in the Constitution that delegates to the Legislature the business of running state elections. So, it was entirely reasonable that this Court would apply Article 2, §11 to the appointment. The present case presents an altogether different question.

If I am not clearly right about this, there is at least enough doubt to make the principle of Wallace v. Grubb, 154 Tenn. 655 applicable. That case declares that Article 2, §11 should be narrowly construed so as to uphold the eligibility of the appointee whenever possible. Under this case, a legislator should not be removed from the commission.

If this part of the Plan is unconstitutional, the balance of it cannot be saved by the doctrine of elision. It is fundamental that the whole statute must fall if the part held unconstitutional is so connected with the statutory scheme, and such an indispensable part thereof, that it is not likely the Legislature would have enacted the act without the elided provision. This proposition is spelled out in a number of cases which can be found in 17 Tenn. Digest, Statutes, §64(1). For example, in Heymann v. Hamilton National Bank, 151 Tenn. 21, 266 S.W., this Court said that elision is not permissible if the result attained defeats the evident legislative intent.

Since the evident legislative intent was to create a commission representative of the legislative, judicial and executive interests in the process of nominating appellate and Supreme Court judges, any act of elision by this Court which leaves such a commission unrepresentative of one of these three major interests, leaves an act which is presumptively inconsistent with the legislative intent.

[fol. 4] One cannot foretell the future of the part of the Plan left after the elision, but I am logically and morally certain that, conceiving of a commission which represented the legislative, executive and judicial interests in the appellate and Supreme Court judges, the Legislature would not have created a commission representative of only the executive and the judicial interests.

The exclusion of legislators from the commission has been dealt with at some length because it could result in there not being any such a commission in the future, and this would be a bad thing. This is the best plan yet devised for the selection of judicial appointees, and it is to be hoped that this part of the Plan, or any other similar plan will be provided by the Legislature.

The part of the Plan that does away with the popular election of judges, and substitutes a recall election, is so obviously contrary to the arrangement in our Constitution, as presently written, for the people to have the right both to *nominate* and *elect* their constitutional officers, that it is difficult to explain why it is unconstitutional. How do you explain the obvious? All you can do is to point out the plain clear words of the Constitution and say, "read, and follow it".

Article 6, §3 provides "The judges of the Supreme Court shall be elected by the qualified voters of the State". Judges as well as other civil officers contemplated by the Constitution are to be elected as provided for by Article 7, §5 of our Constitution. This section says in part 'Elections for judicial and other civil officers shall be held . . . . .", and then goes on to say that they shall be held on the first Thursday in August next preceding the expiration of their respective terms of service. This section of the Constitution fixes the day for computing the term of office of all state judicial and civil officers, and clearly contemplates one general popular election to be held on the day fixed for all those in office whose terms expire on August 31.

[fol. 5]

Ever since the adoption of our first constitution in 1796, the election of constitutional and civil officers has been by popular vote, in elections in which the people have had the

right to nominate their candidates and elect their officers; elections in which people have had the right to do as Judge Taylor did, to run without nomination. Now, the majority says that the Legislature can abolish this once constitutional right to choose and elect judges by redefining the provision so as not to require popular elections, but to permit these officials, once they get in office by appointment, to remain there until some undefined percent of the electorate votes to recall them.

I say indefinite percentage, because, although the determination of a popular election has always been on the basis of the candidate who received the most votes, this is not true of recall referendums. Recalls, not pitting one candidate against another, are not based on who gets the most votes, but upon a percentage fixed in the law under which the referendum is held. The Constitution does not fix this percentage. The percentage is not implied by the nature of the referendum as in a popular election. This leaves the Legislature free to fix the percentage as it chooses.

As important, and potentially troublesome as it is, nothing is said in the majority opinion about [fol. 6] the effect of this holding on the election of civil officers. Article 7, §5 not only provides for the election of judges, it provides for the election of all civil officers referred to in the Constitution. Having said Article 7, §5 can mean no more popular elections for judges, this of course means that the Legislature can do away with popular elections for civil officers. This means that the Legislature can constitutionally keep all constitutional civil officers in office until they are recalled by a percentum of the vote the Legislature chooses to fix.

I do not suggest that the Legislature would be so irresponsible as to do this. I simply point out that the majority in providing for judges, (whose offices, I agree, should be depoliticalized to the greatest extent possible), has had to free constitutional civil officers from the requirement of popular election, because judges and civil officers are both dealt with in the same article and section, and for that matter in the same sentence, in the Constitution.

It is not necessary for me to dwell on the possible chaotic consequences of the construction placed on Article 7, §5, by the majority; and this is not, necessarily, the point. The point is that by redefining Article 7, §5 to permit judges and civil officers to remain in office until recalled, the whole purpose and intent of the Constitution to have government by popular elections has been destroyed.

The Constitution of Tennessee, Article 2, §1, declares that the powers of government shall be divided into three distinct departments: the Legislative, Executive and Judicial. §2 of Article 2, declares that no person or persons belonging to one of these departments [fol. 7] shall exercise any of the powers properly belonging to either of the others, except as permitted by the Constitution.

The very existence of constitutional government depends upon the preservation of this arrangement. It is so important that nothing should ever be done that would impair it.

As long as each of these branches of government was answerable alone to the people it could maintain its independence, and thus continue inviolate and in perpetuity the grand constitutional scheme. But now the deadly serious question that arises is, whether, since the con-

stitutional plan for election of one of these branches of government by the people, and the plan for the election of all civil officers by the people, has been held to be within the power of the Legislature, both the other branches of government are in jeopardy. Because, if the provision for the election of Supreme Court judges and appellate court judges and all constitutional civil officers can be read as requiring only a recall election, what is to prevent the provisions in Article 2, for the election of representatives and senators, and the provisions in Article 3 for the election of the Governor, to be construed in the same way. Virtually the same language is used in each instance. The election that is contemplated in these sections of the Constitution is no more defined than that provided for judges and civil officers. So, if "elections" by the qualified voters in Articles 6 and 7, mean a recall referendum, then, of course, it can mean recall referendums in the Articles providing for the election of representatives and senators, and the Governor.

[fol. 8] It is not enough to say that in all probability this will not happen. The fact that it is possible under the redefinition given in the majority opinion to the constitutional provision for judicial and civil elections is enough to condemn the Plan.

Let me say in conclusion that I dissent from the majority opinion for the further reason that, by turning over to the Legislature the right to say how Supreme Court judges shall be chosen, this Supreme Court abdicates its place as a coequal part of our tripartite state government, and subordinates itself to the Legislature. Of this subordination there can be no doubt. Where once the Constitution protected this Court, and preserved it, it must now take its chances with the Legislature. Today the plan provides

for recall by majority vote. But, this being only statutory, what is to keep the Legislature from providing for recall by a different percent. For that matter, what is to keep it from saying that a judge must be approved by an affirmative vote of such a percentage as will empty the Bench of presently serving judges.

We are today witnessing a sad consequence of this subordination of this Supreme Court to the Legislature. Judicial notice can be taken of the fact that a bill has been introduced in the Legislature to repeal the Modified Missouri Plan. This bill pits its proponents and opponents in an unseemly struggle. It embarasses legislators who are lawyers by focusing on their sworn concern to uphold the Constitution as it has been interpreted for nearly two hundred years, and their natural concern not to be anymore objectionable than necessary to Supreme Court and appellate judges. All of this is wrong. It is destructive of confidence in the Courts.

[fol. 9] The outcome of this repeal effort is really insignificant. The harm has been done. By saying to the Legislature that it can define elections as it chooses with respect to Supreme Court judges and civil officers, and thereby giving the Legislature the same right to define elections as they choose with respect to themselves and the Governor, this Court has opened Pandora's Box. And, though the evils locked up therein may not surface immediately, and in fact may never surface, there is no constitutional guarantee that they cannot, as was the case before the majority opinion was written.

/s/ Allison B. Humphreys
ALLISON B. HUMPHREYS, JUSTICE.

SUPREME COURT, NASHVILLE

[fol. 1]

STATE OF TENNESSEE by THOMAS H. SHRIVER, DISTRICT ATTORNEY GENERAL, on Relation of THOMAS A. HIGGINS	
vs.	Davidson Equity
WINFIELD DUNN, JOE C. CARR, THOMAS F. TURLEY, JR., ROBERT L. TAYLOR and DAVID M. PACK	Affirmed.

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and decreed by this Court:

1. That this case was brought properly pursuant to the provisions of T.C.A. 23-2801, *et seq.* and this action meets the jurisdictional and venue requirements of the provisions of T.C.A. 23-2801, *et seq.*

2. That this case be dismissed to the extent that it was brought pursuant to the provisions of T.C.A. 23-1101, *et seq.*

3. That this case be dismissed as to the defendants, Winfield Dunn, Joe C. Carr and David M. Pack.

4. That the claim of the defendant, Thomas F. Turley, Jr., to the office of Associate Justice of the Supreme Court of Tennessee be deemed a nullity and that the commission issued to the defendant, Turley, be and the same hereby is declared null and void and of no force and effect.

[fol. 2] 5. That the claim of the defendant, Robert L. Taylor, to the office of Associate Justice of the Supreme Court of Tennessee be deemed a nullity and that the certificate of election issued to the defendant, Taylor, be and the same hereby is declared null and void and of no force and effect.

6. That Chapter 198 of the Public Acts of 1971, codified as Sections 17-701 to 17-716, inclusive, T.C.A., with the exception of Subsection 3 of Section 2 of Chapter 198 (paragraph (3) of Section 17-702, T.C.A.) is not in conflict with the provisions of the Constitution of the State of Tennessee.

The costs of the case, including the costs of appeal, will be paid one-half by State of Tennessee by Thomas H. Shriver, District Attorney General, on Relation of Thomas A. Higgins, as Principal, and Thomas I. Carlton, Jr., Surety; one-fourth by Thomas F. Turley, Jr., Principal, and Ward DeWitt, Jr., Surety; and one-fourth by Robert L. Taylor, Principal, and Cecil D. Branstetter, Surety; and for all of the foregoing execution may issue if necessary. 3/19/73.
(Humphreys, J., Dissenting)

SUPREME COURT, NASHVILLE

[fol. 1]

STATE OF TENNESSEE by THOMAS H. SHRIVER, DISTRICT ATTORNEY GENERAL, on Relation of THOMAS A. HIGGINS	
vs.	Davidson Equity
WINFIELD DUNN, ET AL	Extension.

Upon application of counsel and approval of the Court, the time in this cause for filing petition to rehear is extended to and including April 2, 1973, and it is so ordered. 3/26/73.

/s/ George F. McCanless
JUSTICE

[fol. 1]

SUPREME COURT
State of Tennessee
Nashville 37219

April 9, 1973

Mr. Ramsey Leathers, Clerk,
Supreme Court of Tennessee,
Supreme Court Building,
Nashville, Tennessee. 37219

FILED
APR 9 1973
RAMSEY LEATHERS
Clerk
SUPREME COURT

Re: State of Tennessee by Thomas H. Shriver, District Attorney General, on Relation of Thomas A. Higgins, vs. Winfield Dunn, Joe C. Carr, Thomas F. Turley, Jr., Robert L. Taylor and David M. Pack, - Davidson Equity.

Dear Mr. Leathers:

I was advised by Mr. Justice McCanless on Friday afternoon that he would file an opinion on the Petitions to Rehear on today. I received this notice at the same time I received copies of petitions to rehear, the last one of which was filed on the same day that Judge McCanless gave me this notice and sent me a copy of the opinion on the petitions to rehear.

Although I have read the petitions to rehear, I have not had time to give them the consideration they deserve. So, my separate opinion will not be filed for a day or two. In the meantime, since there seems to be some haste to release the majority opinion please do not hold up its release on my account.

Sincerely,

/s/ Allison B. Humphreys
Allison B. Humphreys

ABH/ecm

[fol. 1]

STATE OF TENNESSEE BY THOMAS H. SHRIVER, DISTRICT ATTORNEY GENERAL, on Relation of THOMAS A. HIGGINS

V.

WINFIELD DUNN, JOE C. CARR, THOMAS F. TURLEY, JR., ROBERT L. TAYLOR and DAVID M. PACK

FILED
APR 9 1973
RAMSEY LEATHERS
Clerk
SUPRME COURT

OPINION ON PETITION TO REHEAR

In this cause the Attorney General and Reporter has filed his petition to rehear, seeking a clarification of the Court's majority opinion, filed March 19, 1973, insisting that that opinion leaves undetermined the manner in which the existing vacancy on the Supreme Court is to be filled. This is not a correct understanding of our opinion. We grant the petition to rehear in order to explain and clarify this feature of it.

We held that there was no election as the Constitution requires for that part of the term that began on September 1, 1972. The vacancy exists. We also held valid Chapter 198 of the Public Acts of 1971 (Sections 17-701 to 17-716, inclusive, Tennessee Code Annotated), the statute under the authority of which vacancies on the Supreme Court must be filled.

[fol. 2] Nothing in our opinion was intended to prevent the Governor from now giving notice to the Appellate Court Nominating Commission of the existence of the vacancy caused by the death of Justice Creson and re-

ceiving nominees therefrom all as provided by Chapter 198 of the Public Acts of 1971.

/s/ George F. McCanless
George F. McCanless, Justice.

Chattin, J., McAmis and
Wilson, Sp. JJ., concur.

SUPREME COURT, NASHVILLE

[fol. 1]

STATE OF TENNESSEE BY THOMAS H. SHRIVER, DISTRICT ATTORNEY GENERAL, on Relation of THOMAS A. HIGGINS

VS.

WINFIELD DUNN, JOE C. CARR, THOMAS F. TURLEY, JR., ROBERT L. TAYLOR and DAVID M. PACK

} Petition to Rehear of the Attorney Gener and Reporter Seeking a Clarification Grant

In this cause the Attorney General and Reporter has filed his petition to rehear, seeking a clarification of the Court's majority opinion, filed March 19, 1973, insisting that that opinion leaves undetermined the manner in which the existing vacancy on the Supreme Court is to be filled. This is not a correct understanding of our opinion. We grant the petition to rehear in order to explain and clarify this feature of it.

We held that there was no election as the Constitution requires for that part of the term that began on September 1, 1972. The vacancy exists. We also held valid Chapter 198 of the Public Acts of 1971 (Sections 17-701 to 17-71 inclusive, Tennessee Code Annotated), the statute under the authority of which vacancies on the Supreme Court must be filled.

Nothing in our opinion was intended to prevent the Governor from now giving notice to the Appellate Court Nominating Commission of the existence of the vacancy caused by the death of Justice Creson and receiving nominees therefrom all as provided by Chapter 198 of the Public Acts of 1971. 4/9/73.

[fol. 1]
STATE OF TENNESSEE BY
THOMAS H. SHRIVER,
DISTRICT ATTORNEY GENERAL,
ON RELATION OF THOMAS A.
HIGGINS

V.

WINFIELD DUNN, ET AL

FILED
APR 23 1973
RAMSEY LEATHERS
Clerk
SUPRME COURT

DAVIDSON

EQUITY

ON PETITION TO REHEAR

Defendant Turley has filed an earnest petition to rehear. He insists we misconstrued and misapplied T.C.A. Section 17-712(2). We disagree.

At the time the Governor appointed Turley by constitutional mandate he could only appoint him subject to the election of August 3, 1972. Article 7, Section 5 Constitution of Tennessee.

To construe and apply T.C.A. Section 17-712(2), as insisted by this defendant, would amount to an unconstitutional application of that Section.

The petition is denied.

/s/ George F. McCanless
George F. McCanless, Justice.

Dyer, C. J., not participating.
Chattin, J., McAmis and Wilson, Sp. JJ., concur.

[fol. 1]

STATE OF TENNESSEE BY
THOMAS H. SHRIVER,
DISTRICT ATTORNEY GENERAL
ON RELATION OF THOMAS H.
HIGGINS

V.

WINFIELD DUNN, ET AL

FILED
APR 23 1973
RAMSEY LEATHERS
Clerk
SUPREME COURT

DAVIDSON
EQUITY

ON PETITION TO REHEAR

Defendant Taylor has filed a petition to rehear. It points out no decisive matter of law or fact overlooked, but argues matters which this defendant insists were improperly decided.

> "The office of a petition to rehear is to call the attention of the court to matters overlooked, not those things which counsel supposes were improperly decided after full consideration." *West vs. Carr*, 212 Tenn. 367, 370 S.W.2d 469 [1963].

The petition is denied.

/s/ George F. McCanless
George F. McCanless, Justic.

Dyer, C. J., not participating.
Chattin, J., McAmis and Wilson,
Sp. JJ., concur.

SUPREME COURT, NASHVILLE

[fol. 1]

STATE OF TENNESSEE BY THOMAS H. SHRIVER, DISTRICT ATTORNEY GENERAL, ON RELATION OF THOMAS A. HIGGINS

vs.

WINFIELD DUNN, ET AL

Davidson Equity

Petition to Rehear of Defendant Taylor Denied; Petition to Rehear of Defendant Turley Denied.

This cause coming on further to be heard upon a petition to rehear filed by Defendant Taylor and a petition to rehear filed by Defendant Turley; and upon consideration thereof, the Court is of opinion that there is no merit in said petitions. The petition of Defendant Taylor is denied; the petition of Defendant Turley is denied. 4/23/73.

[fol. 1]

STATE OF TENNESSEE BY THOMAS H. SHRIVER, DISTRICT ATTORNEY GENERAL, on RELATION OF THOMAS A. HIGGINS,

VS.

WINFIELD DUNN, JOE C. CARR, THOMAS F. TURLEY, JR., ROBERT L. TAYLOR and DAVID M. PACK.

FILED
APR 24 1973
RAMSEY LEATHERS
Clerk
SUPREME COURT

DAVIDSON
EQUITY.

DISSENTING OPINION

I take advantage of the petitions to rehear by all the parties to edit my original dissent. This I do by withdrawing the original dissent and filing this one in its place. I concur in the result of much of the majority opinion. So, for the sake of brevity, I shall only mention that part from which I dissent.

I dissent from the redefinition of a constitutionally mandated election to permit only a referendum, so that no one can run in the August election except the appointee.

I dissent from the holding that no member of the General Assembly can serve on the nomination commission.

To the extent that the Modified Missouri Plan provides for the selection of possible appointees by a commission, it is constitutional under Article 7, §4 of the Constitution of Tennessee which provides, "The election of all officers and the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct."

[fol. 2] This part of the plan is a vast improvement over anything we have had, and since the entirely unnecessary exclusion of legislators from such a commission jeopardizes this arrangement, I must dissent.

My dissent from the holding that no member of the Legislature can serve on this commission is based on the simple proposition that, since the manner of filling vacancies is expressly entrusted entirely to the Legislature by Article 7, §4 of the Constitution, and so is legislative business, legislators can serve on the commission without violating Article 2, §11. Article 2, §11 provides that "a member of the Legislature shall not be eligible to any office or place of trust the appointment to which is vested in the Executive or the General Assembly." It would seem to be clear that Article 2, §11, applies to offices that are not legislative, and not to commissions that are designed to carry out legislative business. Since Article 7, §4 of the Constitution declares that power to fill vacancies on this Court is peculiarly the business of the Legislature, it is difficult to conceive how Article 2, §11, prohibits this. Suppose the Legislature had provided for a commission of nine of its own members to recommend appointees to the Governor, could it be said that this commission would be unconstitutionally constituted? Suppose it had passed a law whereby it filled vacancies, would this be unconstitutional? The answer must be in the negative. Then, how can it be that three members of the Legislature cannot serve on such a commission?

The majority opinion cites State ex rel. v. Bratten, 148 Tenn. 174, 252 S.W.2d 705 (1932), as authority for invalidating legislator membership on the commission.

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Commission. There is nothing in the Constitution that delegates to the Legislature the business of running state elections. So, it was entirely reasonable that this Court would apply Article 2, §11 to the appointment. The present case presents an altogether different question.

If I am not clearly right about this, there is at least enough doubt to make the principle of Wallace v. Grubb, 154 Tenn. 655 applicable. That case declares that Article 2, §11 should be narrowly construed so as to uphold the eligibility of the appointee whenever possible. Under this case, a legislator should not be removed from the commission.

If this part of the Plan is unconstitutional, the balance of it cannot be saved by the doctrine of elision. It is fundamental that the whole statute must fall if the part held unconstitutional is so connected with the statutory scheme, and such an indispensable part thereof, that it is not likely the Legislature would have enacted the act without the elided provision. This proposition is spelled out in a number of cases which can be found in 17 Tenn. Digest, Statutes, §64(1). For example, in Heymann v. Hamilton National Bank, 151 Tenn. 21, 266 S.W., this Court said that elision is not permissible if the result attained defeats the evident legislative intent.

Since the evident legislative intent was to create a commission representative of the legislative, judicial and executive interests in the process of nominating appellate and Supreme Court judges, any act of elision by
[fol. 4] this Court which leaves such a commission unrepresentative of one of these three major interests, leaves an act which is presumptively inconsistent with the legislative intent.

The part of the Plan that does away with the popular election of judges, and substitutes a recall election, is so obviously contrary to the arrangement in our Constitution, as presently written, for the people to have the right both to *nominate* and *elect* their constitutional officers, that it is difficult to explain why it is unconstitutional. How do you explain the obvious? All you can do is to point out the plain clear words of the Constitution and say, "read it, and follow it".

Article 6, §3 provides "The Judges of the Supreme Court shall be elected by the qualified voters of the State". Judges as well as other civil officers contemplated by the Constitution are to be elected as provided for by Article 7, §5 of our Constitution. This section says in part "Elections for judicial and other civil officers shall be held . . . . .", and then goes on to say that they shall be held on the first Thursday in August next preceding the expiration of their respective terms of service. This section of the Constitution fixes the day for computing the term of office of all state judicial and civil officers, and clearly contemplates one general popular election to be held on the day fixed for all those in office whose terms expire on August 31.

Ever since the adoption of our first constitution in 1796, the election of constitutional and civil officers has been by popular vote, in elections in which the people have had the right to nominate their candates and elect their
[fol. 5] officers; elections in which people have had the right to do as Judge Taylor did, to run without nomination. Now, the majority says that the Legislature can abolish this once constitutional right to choose and elect judges by redefining the provision so as not to require popular elections, but to permit these officials, once they

get in office by appointment, to remain there until some undefined percent of the electorate votes to recall them.

I say indefinite percentage, because, although the determination of a popular election has always been on the basis of the candidate who received the most votes, this is not true of recall referendums. Recalls, not pitting one candidate against another, are not based on who gets the most votes, but upon a percentage fixed in the law under which the referendum is held. The Constitution does not fix this percentage. The percentage is not implied by the nature of the referendum as in a popular election. This leaves the Legislature free to fix the percentage as it chooses.

As important, and potentially troublesome as it is, nothing is said in the majority opinion about the effect of this holding on the election of civil officers. Article 7, §5 not only provides for the election of judges, it provides for the election of all civil officers referred to in the Constitution. Having said Article 7, §5 can mean no more popular elections for judges, this of course means that the Legislature can do away with popular elections for civil officers. This means that the Legislature can constitutionally keep all constitutional civil officers in office until they are recalled by a percentum of the vote the Legislature chooses to fix.

[fol. 6] I do not suggest that the Legislature would be so irresponsible as to this. I simply point out that the majority in providing for judges, (whose offices, I agree, should be depoliticalized to the greatest extent possible), has had to free constitutional civil officers from the requirement of popular election, because judges and civil officers are both dealt with in the same article and section, and for that matter in the same sentence, in the Constitution.

It is not necessary for me to dwell on the possible chaotic consequences of the construction placed on Article 7, §5, by the majority; and this is not, necessarily, the point. The point is that by redefining Article 7, §5 to permit judges and civil officers to remain in office until recalled, the whole purpose and intent of the Constitution to have government by popular elections has been destroyed.

The Constitution of Tennessee, Article 2, §1, declares that the powers of government shall be divided into three distinct departments: the Legislative, Executive and Judicial. §2 of Article 2, declares that no person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except as permitted by the Constitution.

The very existence of constitutional government depends upon the preservation of this arrangement. It is so important that nothing should ever be done that would impair it.

As long as each of these branches of government was answerable alone to the people it could maintain
[fol. 7] its independence, and thus continue inviolate and in perpetuity the grand constitutional scheme. But now the deadly serious question that arises is, whether, since the constitutional plan for election of one of these branches of government by the people, and the plan for the election of all civil officers by the people, has been held to be within the power of the Legislature, both the other branches of government are in jeopardy. Because, if the provision for the election of Supreme Court judges and all other judges, and all constitutional civil officers, can be read as requiring only a recall election, what is to prevent the provisions in Article 2, for the election of representatives and senators, and the provisions of Article

6, §5, for the election of district attorneys general from being construed in the same way. Virtually the same language is used in each instance. The election that is contemplated in these sections of the Constitution is no more defined than that provided for judges and civil officers. So, if "elections" by the qualified voters in Articles 6 and 7, mean a recall referendum, then, of course, it can mean recall referendums in the Articles providing for the election of representatives, senators, district attorneys general, and all other civil officers.

It is not enough to say that this may not happen. The fact that it is possible is enough to condemn the Plan.

Let me say in conclusion that I dissent from the majority opinion for the further reason that, by turning over to the Legislature the right to say how Supreme Court Judges shall be chosen, this Supreme Court abdicates its place as a coequal part of our tripartite state government, and subordinates itself to the Legislature. Of this subordination, there can be no doubt. Where once the [fol. 8] Constitution protected this Court, and preserved it, it must now take its chances with the Legislature. Today the Plan provides for recall by majority vote. But this is only statutory, so what is to keep the Legislature from providing for recall by a different percentage. For that matter, what is to keep it from saying that a judge must approved by an affirmative vote of such a percentage as will empty the Bench of presently serving judges? If all of this is truly within the power of the Legislature, there is nothing to save this Court.

We are today witnessing a sad consequence of this subordination of this Supreme Court to the Legislature. Judicial notice can be taken of the fact that a bill has been introduced in the Legislature to repeal the Modified

Missouri Plan. This bill may be defeated. But, that need not be the end of it. Another bill can be introduced next session, or the session after that, ad infinitum, so that Supreme Court Judges and, possibly, all judges, can be kept in attendance by the Legislature, hat in hand, so to speak, whenever it suits the purpose of some disgruntled representatives to snap the Court to attention with a bill to change the manner of their election. If this is not subordination, nothing is. If this is not more political than election by the people, nothing is. Have we not, like Esau, sold our precious birthright, equality and freedom for a mess of potage, a cheap, easy way to be perpetuated in office? I say this Court has opened Pandora's Box, and, that although the evils locked up therein may not surface immediately, and in fact may never surface, there is no longer any constitutional guarantee that they cannot, as was the case before the majority opinion was written.

/s/ Allison B. Humphreys.
ALLISON B. HUMPHREYS, JUSTICE.

[fol. 1]

STATE OF TENNESSEE BY THOMAS H. SHRIVER, DISTRICT ATTORNEY GENERAL, on relation of THOMAS A. HIGGINS,

VS.

WINFIELD DUNN, JOE C. CARR, THOMAS F. TURLEY, JR., ROBERT L. TAYLOR and DAVID M. PACK

FILED
APR 24 1973
RAMSEY LEATHERS
Clerk
SUPREME COURT

DAVIDSON EQUITY.

SEPARATE OPINION ON PETITIONS TO REHEAR

While maintaining my dissent, I agree, as insisted by the petition to rehear filed by the Attorney General, that there is now nothing to bar the implementation of the Plan to fill the existing vacancy on this Court. My mind is satisfied that the Plan is unconstitutional, but, if we are to operate under it, the vacancy on the Court must be filled under it.

During the argument of this case at Knoxville, and in conference, I expressed the opinion that if neither Mr. Turley nor Mr. Taylor was entitled to the office, and if the Plan was to be upheld, it would be necessary to proceed anew under the Plan, the principle of functus officio so requiring. I am still of that opinion.

Turning to Mr. Turley's petition to rehear: It makes the point that, inasmuch as his appointive term did not commence until September 1, 1972, it could not have expired on August 31, 1972. And, as there is nothing in §17-112(2) T.C.A., nor in any other provision
[fol. 2] of the Plan to prohibit the making of the appointment after that date, his appointment is valid.

Mr. Turley argues further that if the Plan is valid, so that the whole subject matter is subject to control by the legislature, then his appointment on September 1, 1972 was valid.

Assuming the validity of the Plan, Mr. Turley is, of course, correct. The majority in its original opinion said Mr. Turley's appointment was invalid because, "by the express terms of §17-712(2) the period to which the Governor could appoint him (Mr. Turley) already had expired before his attempted appointment became effective."

It is perfectly clear from the statute that, instead of expressly applying to cut off the appointing power on August 31, it expressly applies only to *judges already appointed and serving terms of office*, and Mr. Turley was not in this category. The statute reads as follows:

> "17-712(2). The *terms* of all justices or judges *appointed* under this act shall expire August 31 following the next August biennial general election recurring more than thirty (30) days after the vacancy."

How this language affects the power to appoint after September 1, I shall never understand. Proof that it does not is to be found in the majority's rehear opinion, holding that now an appointment can be made.

I concurred in the result reached by the majority that Mr. Turley's appointment was void on the ground that this was required by that part of Article 7, §5 of the [fol. 3] Constitution which provides, "and such vacancy shall be filled at the next Biennial election recurring more than thirty days after the vacancy occurs.", not the statute.

I am compelled to concede, however, that if the clear mandate of our Constitution that Supreme Court Judges shall "be elected by the qualified voters", can be read as authorizing a plan under which the qualified voters never get to elect a Supreme Court Judge, then there is no reason at all not to read §17-712(2) T.C.A. any way that gets the desired result.

Judge Taylor's original and supplemental petitions to rehear consist largely of reargument of the grounds on which he originally relied. I could not agree with them then, and I cannot agree with them now.

Judge Taylor has, however, placed before the Court portions of the Constitutional Convention of 1870, which make it perfectly clear that before the resolution of the question, whether the Supreme Court should be elected by the qualified voters of the State or be appointed as are federal judges, there was much debate, and that it was finally decided that Supreme Court judges should be elected by the qualified voters. All of this discussion was summarized in Article 6, §3 of the Constitution, where it declares "The Judges of the Supreme Court shall be elected by the qualified voters of the State." This declaration of the manner of choosing Supreme Court Judges is so plain and clear that it does not require support by historical references, as relevant as these references are. If the plain command is going to be ignored, there is
[fol. 4] no reason to hope the discussion giving rise to the command will be noticed.

Hopeless, though the offering of the history was, I thank Mr. Taylor for placing it before the Court.

/s/ Allison B. Humphreys
ALLISON B. HUMPHREYS, JUSTICE.